Polygamy in Canada: Legal and Social Implications for Women and Children

A Collection of Policy Research Reports

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By

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- The extent to which the methodology used and the data collected support the analysis and recommendations;
- The original contribution the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy makers, researchers and other target audiences.

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PREFACE

Good public policy depends on good research. In recognition of this, Status of Women Canada instituted the Policy Research Fund in 1996. It supports independent, nationally relevant policy research on issues linked to the public policy agenda and in need of gender-based analysis. Our objective is to enhance public debate on gender equality issues to enable individuals, organizations, policy makers and policy analysts to participate more effectively in the policy development process.

The focus of the research may be on long-term, emerging policy issues or short-term, policy issues that require an analysis of their gender implications. Funding is awarded through an open, competitive call for proposals. A non-governmental, external committee plays a key role in identifying policy research priorities, selecting research proposals for funding and evaluating the final reports.

The four policy research papers that make up this collection were jointly funded by Status of Women Canada and the Department of Justice Canada under a call for proposals issued in January 2005. In this call for proposals, researchers were asked to explore the legal and social ramifications of the practice of polygamy, including the impacts of the practice of polygamy on women and children and gender equality.

Polygamy is illegal in Canada pursuant to s. 293 of the *Criminal Code*. The practice of polygamy is also contrary to many of Canada's international commitments and to the notion of gender equality that is fundamental to Canadian society. It is essential that any debate regarding polygamy should include a consideration of the need to respect gender equality fully and promote the advancement of all women. These studies contribute to our knowledge base in this area.

We thank all the researchers for their contribution to the public policy debate on this important issue.

ACRONYMS AND ABBREVIATIONS

ACLU	American Civil Liberties Union
AIDS	Acquired Immune Deficiency Syndrome
AIP	Adult interdependent partner
AIRA	*Adult Interdependent Relationships Act*
ALRC	Australian Law Reform Commission
Am. Jur.	*American Jurisprudence*
BBC	British Broadcasting Corporation
BCCT	British Columbia College of Teachers
CBC	Canadian Broadcasting Corporation
CEDAW	*Convention on the Elimination of All Forms of Discrimination against Women*
CIC	Citizenship and Immigration Canada
CTV	Canadian Television Network
FLDS	Fundamentalist Church of Jesus Christ of Latter Day Saints
HIV	Human Immunodeficiency Virus
HSV2	Herpes Simplex Virus 2
ICCPR	International Covenant on Civil and Political Rights
LRC	Law Reform Commission of Canada
UEP	United Effort Plan

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How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis

Angela Campbell

ABSTRACT

Devising effective legislative and policy strategies for dealing with polygamy in Canada requires an analysis as to how practices associated with plural marriage affect the lives of women. This report seeks to illuminate how life within a polygamous marriage might affect women's social and economic status, as well as their overall health and well-being. This report also undertakes an examination of law and policy approaches to polygamy worldwide, with a view to assessing whether existing responses to polygamy adequately address the needs, rights and realities of women living within plural marriages. Based on this analysis, recommendations are made as to the most appropriate approach to polygamy in the Canadian context.

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EXECUTIVE SUMMARY

This report seeks to illuminate the ways in which participation in polygamous marriages affects women's social and economic status, as well as their overall health and well-being. It also aims to examine how communities across the globe have responded to polygamy through law and policy. These investigations are undertaken with a view to assessing whether responses to polygamy worldwide adequately address the needs, interests and realities of women living within plural marriages. Based on this analysis, this report presents a series of recommendations as to the most appropriate approach to polygamy in the Canadian context.

In examining how polygamy affects the lives of women, three main aspects are considered: women's social status, their economic status and their health.

- In regard to social status, four main factors associated with polygamy are considered: rivalry among wives married to the same man ("co-wives"), collaboration and support among co-wives, social isolation, and implications for spousal relationships and gender equality. In addition, this report also considers the impact of polygamy on children, as well as women's relationships with their children.

- With respect to economic status, the circumstances of women in polygamous unions are considered, as are the circumstances of women who might leave their polygamous marriages and/or communities.

- Finally, with respect to women's health, the potential psychological and reproductive health ramifications of polygamous practices are examined.

This analysis reveals that, given the diversity within the global community of women in polygamous marriages, it is extremely difficult to draw a single, unqualified conclusion as to how women experience polygamy. While some women might suffer socially, economically and health-wise as a result of polygamous life, others might benefit. The way in which a woman experiences polygamy will depend largely on a number of social and cultural factors, such as the number of co-wives she has and her relationship with them, cultural perceptions of polygamy, and her role and responsibilities within her marriage and family.

Effective and equitable strategies for dealing with polygamy must account for this diversity among women in polygamy. Yet, law and policy approaches adopted worldwide have been far less nuanced than this. Most jurisdictions have dealt with domestic polygamous practices in one of three ways:

- explicitly allowing it (primarily in countries where Islamic law is recognized in the area of family/personal law);
- explicitly prohibiting it (typically the case in countries governed by secular civil law); or
- a combination of secular and customary law (typically in states where individuals may opt for customary marriages, which allow polygamy).

A number of jurisdictions have also adopted approaches for dealing with foreign polygamous marriages. This involves dealing with plural marriages formed abroad, in countries where polygamy is permitted. Jurisdictions have generally been willing to give effect to such marriages to grant spouses matrimonial relief. However, most states have shown considerably less acceptance of polygamy in the context of immigration applications submitted by polygamous family members.

Current legal approaches to polygamy have not responded adequately to the multi-faceted experiences of women in plural marriages. More specifically, global responses appear to be premised on the presumption that polygamy is either universally harmful or benign to women, without any real analytical justification for this. It is argued here that legal and policy approaches in Canada must target factors detrimental to women (such as abuse, poverty, coercion and nefarious health consequences), rather than the practice of polygamy on its own.

Six principles are proposed in this report to guide the formulation of law and policy in this area:

- equality and full respect for all women;
- sensitivity and caution in regard to cultural relativism;
- legal rules considered "as lived" (i.e., the law must be assessed by examining its practical impact on members of a society);
- respect for diversity among women;
- facilitation of meaningful choices by women; and
- keeping families together wherever possible.

Based on these principles, the following specific recommendations are set forth in this report.

1. Parliament must revisit the current criminalization of bigamy and polygamy, given that these offences are rarely prosecuted and that the penal consequences that ensue from conviction for such offences risk undermining the rights and interests of women and their children.

2. Allegations of abuse within communities and families must be investigated and prosecuted if necessary, regardless of whether the communities and families in question are polygamous.

3. Governance of families and communities must not be abdicated to private individuals and institutions, such as community and religious institutions that support polygamy. The state has a responsibility to oversee family and community relationships, to ensure the promotion of equality and the protection of vulnerable persons in these contexts.

4. The rights and responsibilities of persons in polygamous marriages living in Canada must be better understood and clarified. The effects of polygamous marriages should be recognized for persons who married in good faith. Yet, where a married person domiciled in Canada marries another spouse abroad, the predicaments faced by women and children in these circumstances must be more carefully considered and addressed.

5. Outreach strategies are necessary to inform women about their legal rights and obligations as polygamous spouses. Information must also be disseminated in regard to the potential psychological and reproductive health issues that women in polygamy could face. Finally, information must be made available to these women about resources on which they could rely should they decide to leave their marriages and/or communities.

6. Outreach strategies also must ensure that women who leave polygamy can access appropriate residential shelter and counselling for themselves and their children, if necessary.

7. Finally, given the complex and abundant issues that polygamy raises, legislative reform on this topic should occur only after the completion of additional research based largely on direct communication with, and the involvement of, women in polygamy.

INTRODUCTION

This report seeks to propose legislative and policy recommendations for dealing with the various social controversies and challenges that arise in connection with polygamy. More specifically, it sets out recommendations aimed at ensuring that Canadian responses to this issue are driven by commitments to gender equality, and to preserving the rights of women and their children. Thus, while polygamy raises a host of questions related to issues like religious freedom, the state's role in regulating "private" family relationships, and the recognition of polygamous marriages formed in foreign jurisdictions pursuant to private international law principles, this report considers these questions primarily from the perspective of women's rights and gender equality.

Currently, Canada's *Criminal Code* prohibits the practices of "bigamy" (s. 290(1)) and "polygamy" (s. 293(1)). The former offence involves participating in the ceremony of marriage while already married, or with someone who is known to be married. The offence of polygamy, however, does not necessarily focus on the act of "marriage" per se, but rather on the status of having more than one spouse, or being in a conjugal union with more than one person, simultaneously (see Chapman 2001: 11; Forbes 2003: 1518; Bourdelois 1993: 3). Polygamy thus includes the practice of plural marriage, as well as the practice of entering into plural marriage-like relationships simultaneously.

Polygamy, given that it is a broader concept that can include bigamy, tends to be the focus of the multidisciplinary literature on this subject. It should be noted that while both men and women might practise polygamy,[1] it is predominantly characterized — in all global communities where polygamy exists — by men having multiple wives, rather than women having multiple husbands.[2]

The particular structure and composition of the typical polygamous marriage, namely, the existence of multiple women "sharing" one male spouse, generates pressing questions associated with gender relationships. More specifically, we might ask whether family structures that allow men to have multiple wives, but not the reverse, can ever exist in harmony with the principle of gender equality. We might also question whether women would ever freely and actively "choose" to be part of such a family structure, and if so, what forces would motivate such a choice. Finally, we might be concerned about the nature of the relationships between the wives required to "share" a husband, and the effect of those relationships on women's well-being. In this connection, the effects on children raised in households and communities characterized by polygamy are also of interest.

This report addresses these questions by examining references that document the experiences of women who live, or have lived, in polygamous cultures and societies. As a second objective, this report examines policy approaches to polygamy in various jurisdictions to determine whether they effectively respond to the circumstances of women within plural marriages.

As such, Part I of this paper examines the social, economic and health impacts of polygamy on women. Based on empirical and doctrinal studies, as well as some anecdotal accounts, this part seeks to illuminate what life is like for women in polygamous relationships. It concludes that the global community of women in polygamy is quite heterogeneous and it is, therefore, impossible to draw a single, unqualified conclusion as to whether polygamy harms women. Proper responses to polygamy must be sensitive to the diversity of experiences women in polygamy might encounter, which are largely shaped by social and cultural forces.

Part II of this paper undertakes an examination of legal and policy approaches to polygamy in various jurisdictions worldwide. It considers the treatment of polygamy in nations where this practice is recognized as a valid form of marriage, as well as the varying approaches taken by countries that criminally prohibit and/or refuse to recognize polygamous unions. This discussion permits an analysis of the extent to which existing legal and policy approaches to polygamy adequately address the realities and interests of women within plural marriages.

Informed by the discussion in the first two sections of this report, the third and final part presents an argument as to the most appropriate principles that should be adopted for developing an effective and equitable response to polygamy in Canada. It sets forth a series of principles that should guide policy and legislative development, and ends with a series of more specific recommendations in this regard.

PART I - WOMEN'S EXPERIENCES IN POLYGAMY: SOCIAL, ECONOMIC AND HEALTH EXPERIENCES

The first part of this report discusses the literature that speaks to the circumstances of women living within polygamous marriages. This literature is premised on academic research emanating from various disciplines, such as law, sociology and anthropology. It is also based on reports about, and personal accounts from, women who have lived, or currently live, within communities where plural marriage is commonly practised.

Relevant sources were examined to acquire a sense of how polygamous family structures affect women's lives socially, economically and in terms of their overall health and well-being. The literature was searched, read and relied on with a view to obtaining the narratives of women in polygamy, both locally and internationally. It is maintained that these narratives must be heard by legislators and policy makers seeking to develop a response to polygamy that is consonant with core Canadian social objectives and values, particularly that of gender equality.

Although direct interviews and surveys involving women in polygamous marriages were not part of the research method for this report, such research would be extremely valuable for understanding how women experience polygamy. Thus, while the present report should serve to initiate a discussion about women in polygamy, it should not be interpreted as an exhaustive analysis, or the final word, on this topic. The discourse in this area requires further development, which would benefit immensely from additional research that incorporates direct dialogue with women in polygamy as a fundamental part of its methodology.

Women in Polygamy: Social Experiences

Authors who have written about women living within polygamous societies reveal the multi-faceted social dynamics that operate within these communities. It is impossible to reduce the literature on this topic to a general, blanket statement in regard to the social aspects of polygamous life for women: polygamy is neither entirely "good" nor is it entirely "bad" for women. The social implications of plural marriage are far more intricate than this. On some levels, the social structure of a polygamous family (namely the existence of two or more wives sharing a husband and possibly the same household) might forge a sense of support and even "sisterhood" among the wives. At the same time, polygamous women, although possibly collaborative on occasion, are likely to compete with one another in different circumstances. They might also sense the social strain of subordination vis-à-vis their husbands, given that while women must share one spouse, husbands may have several wives.

This report next discusses the most common social effects of polygamy that emerge from the writing on this issue: rivalry, collaboration and support among co-wives, insularity of polygamous families and communities, and gender inequalities that might emerge from patriarchal family structures. In addition, because of the interdependent relationship between women and their children, a substantial amount of research on women in polygamy also deals with the social and psychological impacts of polygamous life on children. This literature is therefore commented on in the final part of this discussion.

Rivalry among Co-Wives

In view of the fact that polygamy is typically characterized by the union of a single man with two or more women, competition and jealousy among co-wives is commonly observed within plural marriage communities (Al-Krenawi et al. 1997, 2001; Al-Krenawi 1998; Chambers 1997: 66; Madhavan 2002; Starr and Brilmayer 2003: 245-46; Wing 2001: 855; Al-Krenawi and Graham 1999: 502; Thompson and Erez 1994: 31; Jelen 1993: 47-48). This seems predictable, as co-wives likely have very limited private time with the lone husband they share, and thus might vie for his attention and favour. In some polygamous communities, women's self-worth is linked to the number of children they bear and, therefore, having time with their husband is also critical to their status within the family and community (Committee on Polygamous Issues 1993: 6).

Research reveals that in certain contexts, jealousy between co-wives can escalate to intolerable levels, resulting in physical injuries sustained by women. Accounts of immigrant women in France within polygamous marriages provide a stark example. Having moved to a jurisdiction where living expenses are much higher than in their home countries, polygamous families often cannot afford multiple residences for each of a husband's wives and her children (Starr and Brilmayer 2003: 247). As a result, a polygamous family often lives together in crammed and overcrowded conditions, creating an environment that aggravates stress and conflict between co-wives. Indeed, there have been reports of women treated in Paris hospitals for physical injuries resulting from confrontations among family members, often co-wives. Other women have tried committing suicide as a result of this domestic tension (Bissuel 2002; Simons 1996).

The negative consequences of co-wife rivalry might be particularly difficult for first or "senior" wives in certain cultures. For example, Al-Krenawi et al.'s empirical research involving Palestinian plural wives revealed that senior wives within polygamous families are often less favoured by their husbands. They tend to have fewer economic resources, and receive less conjugal support and attention than junior wives. This differential treatment by husbands is attributed to the fact that Palestinian senior wives are typically married to men through arranged marriages based on exchange, while subsequent, junior wives are chosen by husbands, and their marriages are based on love matches (Al-Krenawi et al. 2001, 2002).

Yet, a different view of the dynamic between senior and junior wives is offered by other commentators. In some cultures, becoming a senior wife implies a promotion within the family hierarchy that entails respect and obedience from junior wives, particularly in the husband's absence (Ahmed 1986: 63; Thompson and Erez 1994: 30-31). Senior wives may exercise considerable authority and control over junior wives, and can be instrumental in helping husbands select an additional wife to assist with child care and domestic responsibilities. At the same time, a husband's independent choosing of a wife on the basis of "romantic love" is likely to cause strife among wives (Gage-Brandon 1992: 291).

Wing's discussion (2001) in relation to the rivalry between first and subsequent wives is also telling, in that it reveals that the status of each wife largely depends on the legal and social culture in which the marriage is situated. In her discussion of Muslim polygamous women living in England, she noted that first wives received the most favoured status. Since domestic polygamy is illegal in the United Kingdom, a subsequent wife is not considered a legal wife, and thus cannot be openly held out as a spouse in all social circles. Often, subsequent wives lived in inferior housing and saw their husbands less frequently than first wives. While women resented these circumstances, they felt that they remained "true wives" even though their marriages were not recognized under civil law (Wing 2001: 855).

This situation could arise in any country that prohibits and rejects polygamy. In these contexts, the first wife might be in a preferred position, since she alone is recognized as a spouse by law. Subsequent spouses married under religious law would be deprived of spousal recognition and spousal benefits, and might have to conceal their conjugal relationships out of fear of criminal prosecution.[3]

The potential for unequal treatment of co-wives by their husbands is a factor that women in polygamy would be keenly aware of, regardless of their cultural background. Among the women who participated in Dangor's survey of South African Muslim women, only a small minority looked favourably on polygamy. An even smaller proportion indicated that they would agree to enter a polygamous marriage if given the option. These opinions were frequently rationalized by feelings that polygamy creates inequality among co-wives, since the husband cannot care for and cater to the needs of more than one wife, and polygamy gives men "boundless power and authority" (Dangor 2001: 117). Similar views were expressed by women interviewed within a research study on polygamy in Mali. Women intimated that inequality was an intrinsic part of polygamy, since it inevitably led a husband to favour one wife (usually the youngest and more attractive) over the others (Madhavan 2002: 75).

Collaboration and Support among Co-Wives

While women married to the same man might commonly view one another with jealousy and perhaps even animosity, some women in plural marriages view their relationships with co-wives as enriching and valuable. Such was the perspective held by South African women studied by Anderson (2000), who perceived relationships with co-wives as providing critical economic support, companionship and child-care assistance. Relationships between co-wives have been found to be especially beneficial to women's economic and political power where there is a familial relationship between the co-wives (Yanca and Low 2003).

Researchers considering American polygamous communities have also observed that women benefit from the female companionship and friendship that polygamy affords, as well as the sharing of child rearing and household responsibilities (Chambers 1997: 73-74; Forbes 2003: 1542-43). While women might initially feel uncomfortable and envious when a new woman enters the household, these sentiments usually fade as the family and community works to ensure harmonious relationships among the women and the equal treatment of the wives. Women thus often encourage their husbands to marry additional wives (Chambers 1997: 73-74).

In addition to companionship and assistance with domestic responsibilities, the female network created through polygamy has also been said to afford other social benefits. Forbes noted that when there is trouble or abuse within a household, women can come together to counter this and assist one another. They can take similar action when their husband engages in any activities of which they disapprove. By expressing their dissatisfaction collectively, women have a greater chance of halting or changing the impugned behaviour (Forbes 2003: 1542-43). It must be noted, though, that other research starkly contrasts this portrayal of co-wives' relationships. Hassouneh-

Philips (2001: 744-46), in her study of Suni Muslim women living in plural marriages in America, noted that domestic abuse often occurs unchecked, despite co-wives' full awareness of a husband's conduct. She suggested that this occurs either because women feel powerless in the face of conjugal violence or because they simply do not wish to intervene. Co-wives might even be the perpetrators of domestic abuse.[4]

There are thus marked inconsistencies in the literature regarding the nature of relationships among co-wives in a polygamous marriage. While some sources indicate that women in plural marriages rival one another, other research maintains that women thrive socially and economically within polygamy, primarily because of the network created with their co-wives. Is it possible to reconcile these different views?

Madhavan's study (2002) on polygamous women in Mali suggested a possible affirmative response. She noted that polygamous family structures are equally capable of giving rise to collaboration among co-wives as they are to competition, but this depends on the socio-cultural context that frames the polygamous family. Women, in fact, espouse the pattern of behaviour that best allows them to subsist within, and benefit from, their family and cultural structures. Thus, if co-wives need each other's support and assistance, they are likely to collaborate. But if such interdependence does not exist and there is little incentive for co-wives to ally with one another, competition is more likely to characterize the relationship among them.

Insularity of Polygamous Families and Communities

Given that polygamy remains criminalized in Canada, families that engage in this practice often do so clandestinely and inconspicuously. To remain shielded from public awareness and scrutiny, a polygamous family would have to minimize its contact with the "outside" world and attempt to conceal its marital and family relationships.

The insularity that we might anticipate within communities secretly practising polygamy also characterizes the only group currently practising polygamy in Canada overtly. The community of Bountiful, located near the town of Creston, British Columbia, was founded nearly 60 years ago by a fundamentalist splinter group of the Mormon Church which advocated polygamy (Committee on Polygamous Issues 1993: 4ff). Plural marriage continues to define this community, which consists of about 1,000 members (*Globe and Mail* 2005).

Given its polygamous character, Bountiful has attracted political and public attention beginning in the early 1990s (Committee on Polygamous Issues 1993: 3), especially quite recently (*Globe and Mail* 2005). Nevertheless, although residents practice plural marriage in plain view of the public, the media and law enforcement authorities, the community itself remains distanced from the rest of Canadian society.

The cloistered nature of Bountiful has developed through what Peters (1994) described as a culture of secrecy typical of fundamentalist Mormon communities. Residents of Bountiful conduct all aspects of their lives within their community, and thus are rarely educated or employed outside of Bountiful (Palmer and Perrin 2004; Committee on Polygamous Issues 1993). The community has also acquired an increasing ability to meet residents' health and social needs, which risks intensifying its insularity as residents will be less likely to move beyond community borders to access necessary resources and services (Committee on Polygamous Issues 1993: 60, 105). Finally, because marriage typically occurs within the group as determined by community leaders, family structures generally form only within the strict contours of the community (Committee on Polygamous Issues 1993: 6-7). Given that nearly all aspects of group members' lives take place within Bountiful, they remain almost exclusively within the community's social and physical borders. As one study focussed on the situation in Bountiful noted, "the lives of most members of the group are conducted completely within the group environment" (Committee on Polygamous Issues 1993: 6).

At the same time, one must be careful about presuming that the isolation of the Bountiful community results solely from the choice of community members to distance themselves from the broader Canadian society. Indeed, the fact that the community lives a very rural and quiet lifestyle, wears traditional dress and practises polygamy as one of its core social and religious tenets would likely lead to its characterization as peculiar, different, perhaps even suspect by other Canadians. Thus, while members of Bountiful might conscientiously withdraw from mainstream society, they remain a fringe group also because their lifestyle might not be accepted or necessarily understood by most Canadians.[5]

In communities characterized by nearly complete insularity from mainstream society, two key concerns in regard to the well-being of members might be raised. The first is a fear that individuals within the group, never having been exposed to anything beyond it, will *lose the perspective and ability needed to make informed, autonomous life choices.* This is particularly so when individuals depend on the community for social and economic sustenance. A second concern associated with insular social groups that remain shielded from public involvement and oversight is the *potential for abuse* within the group.

Limited Perspective and Ability to Make Autonomous Life Choices

The Committee on Polygamous Issues, which studied the dynamics of plural marriage within Bountiful, maintains that membership within this community results in a complete deprivation of individual freedom. Adults believe, and children are taught, that their only life path is to follow the practices prescribed by their leaders.[6] If a group member ultimately wishes to leave the community, the prospect of doing so would seem extremely daunting, if not impossible, given that life within Bountiful considerably limits contact with the "outside" mainstream society (Committee on Polygamous Issues 1993: 11-12, 26ff; Cohen 2003).[7] As a result, a member seeking to leave might not access necessary social and health services due to a learned fear and distrust of the world beyond the immediate community.[8] Moreover, these individuals might lack the information, skills and resources needed to begin life anew, outside of their communities.

Ward (2004) articulated similar concerns in her analysis of polygamy in America, within which she argued that there is no legal rationale for plural marriage to be permitted or sanctioned by the state. She challenged the notion that women who participate in polygamy actively consent to this, given the social isolation and religious indoctrination to which they have been subjected throughout their lives. Ward thus argued that women are victims of "religious coercion" that deprives them of the ability to choose to marry, enter sexual relationships once married or leave their polygamous marriages (Ward 2004: 145-47).

In this connection, the age at which women marry into polygamous unions is often discussed. It is reportedly common for teenage girls — some as young as 14 — to marry men in their 40s or 50s who have been selected by community religious leaders (Al-Krenawi and Graham 1999: 501; Palmer and Perrin 2004; Ward 2004: 149; Peters 1994: 86-87). As a result, contentions that an adolescent girl's decision to marry in this context is based on her own informed and independent consent have been rigourously challenged.

Yet the argument that women in polygamy have been coerced into their marriages has also been disputed. Forbes (2003: 1544-45) suggested that young women who marry polygmously do so willingly, in accord with their religious views and values. There is thus no violation of their rights in this connection. Moreover, women from the Bountiful community have recently come out publicly in strong support of their lifestyle, firmly maintaining that they have made enlightened and active choices in regard to marriage and family relationships and responsibilities (D'Amour 2004a,b).

The issue of choice in relation to marriage in a polygamous society is also linked quite closely to male hierarchies that commonly form in such communities, evidencing economic inequalities and injustices among men. A nearly universal feature of polygamous communities is that only the most affluent and high-ranking men take wives. In many cases, both the potential wife and her family will prefer marriage to a polygamist than marriage to an unmarried man of little means (Borgerhoff Mulder 1992; Anderson 2000: 104). But, when a woman's alternatives are between life with a prominent and affluent community member who is already married, life with an unmarried man who is unable to support his family and who might also be marginalized by his community, or life as an unmarried women in a society that regards marriage as a fundamental social institution, we might again question the extent to which she has a "choice" regarding marriage.

Potential for Abuse

The report produced by the Committee on Polygamous Issues indicated that abuse within the community of Bountiful has taken place on a widespread scale, particularly against children. Nevertheless, this has been subject to minimal public oversight and reaction. The Committee linked this directly to the insularity of the community.[9] Allegations of sexual, physical and psychological abuse were also made in a legal complaint initiated in 2002 by a class of women from Bountiful and other communities in Canada and the United States. They claimed to have suffered this abuse as a result of the communal and polygamist lifestyle within the community (Matas 2002b). Women who have left Bountiful have also called for government action against the men practising plural marriage in that community (Matas 2002a). Although an RCMP investigation into allegations of child abuse, forcible marriage and sexual exploitation was initiated in 2004, no charges have been filed as of yet (*Globe and Mail* 2005).

Views of women who remain in Bountiful must also be considered in this regard. Some have recently spoken out strongly in support of their community leaders, disputing abuse allegations and claiming that women lead happy and satisfying lives within Bountiful. They maintain that they are not duped or coerced into marriage, but actively choose their lifestyles (D'Amour 2004a,b). More recently, however, a group of 15 women from Bountiful participated at a conference on sexual exploitation and child brides, maintaining that the age of sexual consent in Canada should be raised from 14 to 16 years of age (CTV 2005a,b).

There is thus some ambiguity within the views of women in Bountiful as to polygamy. On one hand, they have spoken publicly in support of their lifestyle, disputing claims of abuse and coercion. But at the same time, their statements about the legal age of consent could intimate concern or dissatisfaction in regard to certain aspects of traditional marital practices in their community. This suggests a need for an inquiry of further depth into the genuine interests and concerns of women currently living in polygamous families, particularly by seeking information directly from these women.

Alleged abuse and mistreatment of children within Bountiful have also been reported within the educational context. Children in the community have traditionally attended a local school which is state funded, but administered by group members. At the time the Committee on Polygamous Issues prepared its report, the school's board members, principal and superintendent were all members of the group. In addition, many women in Bountiful received training to become teachers in the school (Committee on Polygamous Issues 1993: 32ff).

The Bountiful school environment has been characterized as emotionally abusive in some cases, and consistent in its provision of substandard education for children (Committee on Polygamous Issues 1993: 35-37; Matas 2002b; Peters 1994: 63ff; Carmichael 2004; Cohen 2003). However, because the school is administered entirely at the local level, it is shielded from public oversight and scrutiny. Given that the superintendent was, at least at the time of the Committee's report, also one of the group's religious leaders, and in view of the authority wielded by such leaders, parents inclined to complain about the school environment might be dissuaded from doing so for fear of social marginalization and reprisal (Committee on Polygamous Issues 1993: 32-33).

Spousal Relationships and Issues of Gender Equality

In virtually all societies studied in preparing this report, polygamy was "polygynous," that is, characterized by a union of one husband and plural wives. Very few polygamous societies in the world are "polyandrous": marked by two or more husbands sharing a single wife. Polyandry is rare since it tends to limit male reproductive success. As Levine and Silk (1997: 376) noted, "a man who marries polyandrously can expect to sire only a fraction of one woman's children." Polyandry might nonetheless arise in circumstances that hinder men's ability to support women and their children adequately (Levine and Silk 1997: 376).

Given that the vast majority of polygamous communities worldwide consist of families headed by one husband having multiple wives, we might question what consequences this social structure has for gender equality. In particular, we might ask whether a union in which two or more women must "share" a husband who in turn enjoys plural sexual and domestic partners, is inherently discriminatory.

This question might be met with the claim that women are actually the primary beneficiaries of polygamy. Given the structure of plural marriage families, men bear the singular responsibility of providing for their multiple wives and many children; whereas women might benefit from this economic support. They might also find a constant source of social support in their co-wives (Forbes 2003: 1543). Furthermore, for some women, plural marriage might represent an important contribution to the legitimacy of their own cultural or religious understandings of family life. These marriages thus might symbolize a crucial association with traditional values, which can provide certainty and security as to a women's role within her known social and cultural order (Rude-Antoine 1991). Finally, it has been argued that although polygamy creates a family structure in which men and women might not wield equal power and authority, this alone is insufficient to consider the practice harmful to women, especially when the patriarchy embedded in more mainstream religions is considered (Chambers 1997: 82).

Having said all this, it has also been strenuously argued that polygamy *is* inherently discriminatory and inhibits gender equality (Adjetey 1995: 1357; Strassberg 1997: 1592ff; Eskridge 1996: 149; Agadjanian and Ezeh 2000; Ward 2004). As M'Salha (2001: 77) noted, legal acceptance of polygamy is enough to thwart women's equality, even if they are not actually in a polygamous marriage. Living with constant uncertainty as to whether a husband will marry again forces a woman to live under the sword of Damocles throughout her marriage.

A key argument raised by opponents of polygamy relates to its potential ability to undermine women's reproductive autonomy. Given the frequent competition among co-wives and because women's worth in polygamous societies is often linked to the number of children they have, women lose the ability to control decisions related to reproduction (Adjetey 1995: 1358; Committee on Polygamous Issues 1993: 8-9). Moreover, polygynous cultures are characterized by patriarchal family structures, within which women have a marginalized ability to question a husband's authority and express individual wishes, even in regard to private issues like childbearing (Agadjanian and Ezeh 2000; Kaganas and Murray 1991: 128-29).

Throughout the literature discussing polygamous spousal relationships, it is quite commonly reported that the patriarchal nature of polygamy leads not only to women's subordination, but also to their sexual, physical and emotional abuse at the hands of their husbands (Chambers 1997: 66, 73-74; Al-Krenawi and Graham 1999: 501ff; Al-Krenawi and Wiesel-Lev 2002: 158; Hassouneh-Phillips 2001: 741ff; Thompson and Erez 1994; Committee on Polygamous Issues 1993: 78ff). Nevertheless, it must be recalled that spousal violence also characterizes too many monogamous relationships, and thus this difficulty is not unique to plural marriage situations. Having said this, where gender inequality lies at the core of a polygamous marriage, it is arguable that there exists an increased risk of spousal violence.

It would also be a mistake to believe that all polygamous marriages are abusive. Many women living in polygamy have supported plural marriage and appear to find happiness and satisfaction within their family structures (D'Amour 2004a,b; Carmichael 2004). Certain anecdotes reveal genuine love and companionship among polygamous spouses and within their entire family unit, leaving us to question whether polygamy is intrinsically damaging to the spousal relationship (Palmer and Perrin 2004; Solomon 2003).

A final point to be considered within the rubric of polygamous spousal relationships is the link between polygamy and divorce. Whether plural marriages are more likely to lead to marital discord and subsequent dissolution is a question that has not yet been answered conclusively. There is some evidence to suggest that a husband's decision to take a subsequent younger wife will frequently cause women to suffer low self-esteem and perhaps, as a result of this, to consider divorce (Al-Krenawi et al. 2001). M'Salha's (2001: 174) discussion regarding plural marriages in Morocco maintains that polygamy risks destabilizing the household and the lives of children, and causes women to experience high levels of insecurity and uncertainty. Divorce might be the foreseeable result.[10] For some women, though, divorce is not an option. Although many feel devastated when their husbands take subsequent wives, they might feel that they have no choice but to accept this situation (Al-Krenawi et al. 1997: 453; Al-Krenawi and Wiesel-Lev 2002: 161-62).[11]

Yet, other work has set forth arguments as to why women in polygamy feel more secure about their marriages than women in monogamous unions. This research indicates that polygamous marriages are less likely to rupture (Forbes 2003: 1542-43). Although, as just noted, M'Salha identified polygamy as a serious potential threat to a marriage, he went on to note that within Islamic Moroccan communities, polygamy might benefit a wife. In particular, it allows a husband to take a new, younger wife without repudiating[12] his first. The social consequences of repudiation can be worse for women than the circumstances of living in a polygamous marriage (M'Sahla 2001: 175).

It is thus difficult to draw a distinct correlation between polygamy and marital disharmony and divorce. The intricacy of this issue is evident in a Nigerian-based study (Gage-Brandon 1992) that revealed that the probability of divorce within polygamous marriages varied considerably according to the number of wives in the union. This research found that the most stable unions were those where one man married two wives. These marriages resulted in divorce less frequently than polygamous marriages involving more than two wives. They were also less likely to lead to divorce than monogamous unions. As such, this study revealed that viewing polygamous and monogamous marriages as dichotomous could lead to erroneous generalizations about each.

Children in Polygamy and Women's Relationships with Their Children

The research that considers the experience of women in polygamy also sheds light on the circumstances of children growing up in plural marriage families. In particular, this work allows for an analysis of how the social dynamics within polygamous families might impact children and youth. However, this research that speaks to the experiences of children in polygamous families does not, unfortunately, consider girls and boys separately. Rather, the data are aggregated, revealing how children and adolescents generally fare in areas like health and academics. However, some reports have emerged to suggest that, at least in fundamentalist Mormon communities, boys and girls are treated differently. In particular, while young girls are urged to remain within their communities to become wives during their adolescence, community leaders drive out many teenaged boys, to reduce the "competition" for young wives. Indeed, it is reported that as many as 400 boys as young as 13 years of age have been banished from their communities by fundamentalist leaders in Utah and Arizona, leaving many of them homeless, substance-addicted or working as prostitutes (Tresniowski 2005).[13]

Academic Achievement and Intellectual Development

The literature includes quite an elaborate discussion as to how polygamy might affect a child's intellectual and scholastic development. Some factors will affect academic achievement regardless of whether the child is raised in a polygamous or monogamous family (Cherian

1994). But Elbedour et al.'s work on adolescents within Israeli Bedouin-Arab communities was premised on the hypothesis that polygamous family structures would engender lower levels of intelligence and scholastic achievement among youth from polygamous families (Elbedour et al. 2003a,b, 2000).

This hypothesis was based on polygamy's association with higher risks of psychological maladjustment in children, and with families having lower socio-economic status. Both of these factors impact academic achievement. Various studies confirm that children from polygamous families are at an enhanced risk of psychological and physical abuse. While not entirely conclusive, research indicates that children can be adversely affected by rivalry between co-wives, and by the fact that more children in the family may mean less time with, and attention and supervision from parents, especially their fathers (Elbedour et al. 2003a, 2000, 2003b: 229; Strassmann 1997: 693; Jelen 1993: 48-49; Simons 1996). Moreover, a polygamous family structure might diminish the economic resources available to children and adolescents, which in turn might limit their access to books and activities that would foster learning skills (Elbedour et al. 2000).

Yet, despite the social and economic factors underlying Elbedour et al.'s hypothesis that polygamy would adversely affect academic achievements among youth, the researchers actually found that an adolescent's family structure bore no significant impact on academic development (Elbedour et al. 2003a, 2000). This outcome was attributed to various factors unique to the Bedouin-Arab cultural group under study. In particular, because polygamy was not viewed as a "taboo" practice in this community, adolescents were less likely to feel "different" or ashamed about their family structure. This, in turn, promoted their learning and literacy skills (Elbedour et al. 2003a, 2000). There was also extensive interaction between children and youth from polygamous and monogamous families within the community, giving them the sense of sharing the same community as their peers, regardless of family structure (Elbedour et al. 2003a). Finally, due to the level of intermingling within the whole community, fathers were less likely to be absent from their children for extended periods, even when they had several wives and many children (Elbedour et al. 2003a). Fathers within this community often live with all of their children and multiple wives within the same home (Elbedour et al. 2000). These factors were all viewed as promoting the psychological health and self-esteem of youth from polygamous families.

At the same time, Elbedour et al.'s research on adolescents is inconsistent with another of their studies examining developmental impacts of polygamy on younger, elementary school-aged children within the same community (Elbedour et al. 2003b). This latter study found that younger children tend to experience higher levels of attention deficit and behavioural problems than children from monogamous families. The researchers posit that these younger children might be more affected by polygamous life than adolescents since they are likely to be more attached to their parents and their immediate home environments, and probably have not yet developed the necessary social networks and mental ability to cope with a stressful home environment (Elbedour et al. 2003b: 231-32).

While the results of Elbedour et al.'s work in relation to older children and adolescents might suggest that children have the ability to outgrow any harmful impacts of polygamy, the particular cultural context of their research must be kept in mind. The widespread support and acceptance of polygamy within Bedouin-Arab culture, the pervasive intermingling of youth from monogamous and polygamous families, and the shared residence of fathers with all wives and children are not traits typical of all polygamous communities. Where these factors are absent, we might expect polygamy to exert some deleterious effects on children and adolescents. Starr and Brilmayer's (2003) research on African wives of polygamous men living in France seems to support this. They noted that because mainstream French society was both unwelcoming of immigrants and disapproving of polygamy, women and their children were ostracized and isolated. In schools, children feared mockery by classmates and delinquency rates among them were reported to be relatively high (Starr and Brilmayer 2003: 246).

In a similar vein, Ward maintains that children of American polygamists suffer as a result of their physical and social isolation. Similar to the situation reported to exist in Bountiful, education in these communities — like all other aspects of life — is controlled by religious authorities. The thoughts and beliefs children encounter are controlled, allowing them only to learn polygamist beliefs, and "blinding children to the existence of life outside polygamy" (Ward 2004: 149).

Moreover, Al-Krenawi et al.'s (1997: 451-52) study in Israeli Bedouin-Arab polygamous communities found that children of senior wives suffered particularly, as they had lower school attendance, more difficulty adjusting to classroom norms, and were less likely to have functional peer and student–teacher relationships. In addition, these children often lacked proper school supplies. The academic achievements of children of senior wives was thus well below the school average.

Factors Potentially Compromising Children's Health

Some research suggests that because polygamous families usually have many children, there cannot be enough supervision and attention for all of them (Committee on Polygamous Issues 1993: 9). It has been argued that this causes children's health and development to suffer (Ward 2004: 149-50).[14]

In her study of polygamous families in Mali, Strassmann (1997) found a marked increase in infant mortality rates of children in polygamous families when compared to rates for children of monogamous parents. This difference could be due to various factors. Strassmann noted in particular, the risk that children may fall victim to co-wife animosity. This became so intense in the Malian community Strassmann studied that reports existed of co-wives abusing and even poisoning each other's children.[15]

An alternate theory Strassmann (1997: 693-94) postulated for the differential rates of child mortality between monogamous and polygamous families is that the latter might invest less in their children, at least in the Malian context. Since polygamous fathers produce a greater number of offspring overall, each child becomes less important to his lifetime reproductive success. Moreover, polygamous families may be less inclined or able to pay for treatments for childhood illness.

The opposite position has also been advanced, although this research appears more equivocal than Strassmann's. According to Anderson (2000), polygamy might in fact benefit child survival rates given the network of co-wives that exists within a plural marriage and can facilitate care arrangements for infants and children. A similar argument is made by Forbes (2003: 1544-45), who noted that the multiplicity of wives within a polygamous household allows for increased child supervision, attention and care. However, this research merely hypothesizes that family structures within polygamy might benefit the health of infants and young children, whereas Strassmann's study showed quite a decisive connection between infant mortality and polygamy in the society she considered. Strassmann's work is strengthened by the fact that other variables, such as access to wealth and food, did not appear to impact infant mortality rates, further supporting the link drawn with polygamy in this research. Strassmann thus indicated that the results of her study "provide the strongest evidence to date for an adverse effect of polygyny on child mortality in a human population" (Strassmann 1997: 694-95).

Summary

Given that the global community of women in polygamy is so heterogeneous, it appears impossible to draw a single, essential conclusion as to how plural marriage affects their social status and well-being. While some women clearly suffer severe detrimental impacts, others publicly support their lifestyles, and feel satisfied and empowered with their family relationships. A similar ambiguity exists within the research examining children in polygamous families. In some scenarios, these children did not seem to be adversely affected by their polygamous family structure. But some research also suggests that polygamy might place children in harm's way, for example, by isolating them socially, or by subjecting them to potentially hateful relationships between co-wives. Since the social aspects of polygamous life for women and children cannot be reduced to a single, uniform description, policy responses to this topic must be responsive to the varied realities that emerge in different plural marriage situations. This is discussed further in the final section of this report.

Women in Polygamy: Economic Experiences

While researchers who have studied the consequences of polygamy for women tend to focus on the social effects of plural marriage, the literature also illuminates some economic impacts of polygamous life. In particular, it discusses the economic circumstances of women living in plural marriages, as well as the circumstances of women who leave plural marriages.

The Economic Circumstances of Women in Polygamy

It is difficult to predict the economic impacts that might arise from polygamous family life. On one hand, we might assume that because polygamy requires one husband to provide for a plurality of wives and a potentially large number of children, resources within the family would be relatively scarce for each family member. Moreover, if wives in a plural marriage are more likely to be restricted to working in the unpaid domestic sphere, they would have limited sources of independent income. Finally, even if these women were to seek gainful employment, their earning potential might be limited if they were married and had children at a very young age, and this precluded the ability to pursue their education beyond that point.

On the other hand, we might also expect some women in polygamy to thrive economically. For example, we might assume that for a man to marry several wives, he would have to be financially able to afford to support each of them. Thus, if married to a wealthy husband, a wife might lead a life of relative affluence, even if her husband's income was shared with other women. Additionally, a polygamous family structure might foster, rather than prevent, women from pursuing educational and employment opportunities. The fact that other wives might be available to support a woman by assisting with child care and domestic responsibilities could theoretically allow her to take on potentially remunerative tasks. Finally, we might expect women married polygamously to benefit from the fact that they live with, or close to, other female family members with whom they could collaborate in their labour, thereby allowing them all to be more productive.

The literature on this issue, when viewed as a whole, indicates that neither hypothesis is entirely accurate or incorrect. A substantial amount of research suggests that polygamy deprives women of economic resources, and of the ability to earn income independently of their husband. For example, a study of polygamous marriages in Ghana indicated that wives in plural marriages were more economically marginalized than their monogamous counterparts. Polygamous wives were also less likely to be working for themselves, since they most often worked for a family member, usually their husband. Researchers found that a significantly higher percentage of women (84 percent versus 63 percent) earned cash for their work in areas with a higher prevalence of monogamy, than in regions primarily characterized by polygamy. Women in higher polygamous regions were also less likely to receive formal schooling and higher education. The authors of this study maintain that the factors limiting women's potential to gain economic independence also diminished their ability to exercise social and reproductive autonomy (Agadjanian and Ezeh: 2000).

While it has been reported that women in polygamy generally perceive greater levels of economic hardship (Al-Krenawi 2001: 191-92), some work suggests that first or senior wives to a polygamous marriage are at a particular disadvantage (Al-Krenawi et al. 2001; Al-Krenawi and Wiesel-Lev 2002). Al-Krenawi et al.'s study, based on interviews with 187 women in plural marriages living in the Gaza Strip, is particularly telling in this regard. Given the pervasive poverty and turbulent political and economic conditions that exist within this area, most of the women who participated in Al-Krenawi et al.'s study had experienced social and economic hardship (Al-Krenawi et al. 2001).

However, senior wives experienced significantly greater economic problems than did junior wives. Researchers found that none of the senior wives interviewed worked outside the home, whereas 40 percent of junior wives did. Senior wives also generally had less formal education, and a greater number of children. Finally, for some senior wives, the transition from monogamy to polygamy resulted in fewer economic resources for them and their children. As such, the economic potential of these women was perceived to be seriously hindered by their polygamous family structure (Al-Krenawi et al. 2001).

Differences between the economic circumstances of senior and junior wives observed in Al-Krenawi et al.'s work might be explained by the fact that in most Arab cultures where polygamy is practised, first marriages are often prearranged between families, whereas second and subsequent unions are more likely to be associated with love between the couple, and an active choice to marry. As a result, second and subsequent wives often bear favoured status with respect to economic resources, social support and attention from their husbands (Al-Krenawi et al. 2001, 1997: 451; Jelen 1993: 47-48).

Although not differentiating between first and subsequent wives, research related to the polygamous community of Bountiful, British Columbia, indicates that women bear a very limited ability to acquire economic resources. The relationships among community members and between group leaders and members seem to render it difficult for any resident of Bountiful — male or female — to acquire economic independence. The situation is, however, admittedly more difficult for women (Committee on Polygamous Issues 1993).

According to the Committee on Polygamous Issues, most of the property within Bountiful is in fact owned by a trust called the United Effort Plan (UEP). This trust was started by a group affiliated with Bountiful in the United States. Members of Bountiful have traditionally been encouraged to deed their property to the UEP, such that they became tenants in their homes leasing their property from the trust. Legal ownership of the property is thus reported to be in the hands of community leaders (Committee on Polygamous Issues 1993: 7-8, 59; Peters 1994: 57ff; 72-73).

The UEP trust is reported to own considerable amounts of property in Bountiful. Although group members built homes and structures on this property at their own expense, these buildings were in fact owned by the UEP, and members resided in them at the discretion of the trust. If a member left the community or was ousted from the group, that individual stood to lose any property that she or he built or paid for without any financial compensation (Committee on Polygamous Issues 1993: 59).

Regarding employment, the Committee on Polygamous Issues reported that members of Bountiful were typically employed locally by group leaders. Wages were kept low and the hours were long. Members were required to give at least 10 percent of their wages back to the group, but often more was given such that workers kept only enough for their own basic sustenance. Women often did not work or receive much financial assistance from their husbands. They were frequently required to support their children on government family allowances (Committee on Polygamous Issues 1993: 59).

As a result of all these conditions, the Committee on Polygamous issues described Bountiful community members as living very frugally. Mothers and their children were often found to live in a single bedroom. It was also not uncommon for an extended family of several wives and all their children to live in one house (Committee on Polygamous Issues 1993: 59). As discussed above, these circumstances are similar to those observed among immigrant women living polygamously in France (Starr and Brilmayer 2003; Bissuel 2002).

Finally, it should be noted that certain reports allege that women living in polygamous unions are at risk of economic exploitation by their husbands. In jurisdictions where their polygamous marriages are not recognized by the state, plural wives may file welfare claims as single mothers in need of child support. However, some reports suggest that husbands have usurped these funds, or funds women otherwise earned, to support themselves and their polygamous lifestyles (Ward

2004: 148-49). In particular, men in France were reported to use their wives' income to fund return visits to their respective countries of origin to marry additional wives (Bissuel 2002; Jelen 1993: 46; Simons 1996).

While the foregoing discussion would indicate that polygamy engenders negative consequences for women in diverse polygamous societies, there is also some research to suggest that this is not universally true of all plural marriages. Polygamy might actually be advantageous for women, given that polygamous husbands in certain societies are obliged to be financially able to sustain multiple families.[16]

Additionally, the pool of labour created within larger domestic units reduces the need for wage labourers, thus keeping more of a husband's wealth within the family to maintain a higher standard of living. Co-wives might also co-operate in trade and economic transactions, thereby reducing costs and potentially providing income for the benefit of the family unit as a whole (Al-Krenawi 1998: 69; Anderson 2000). As such, polygamous households might ultimately have more economic resources, and greater means of production for sustenance, than their monogamous counterparts (Lardoux and Van de Walle 2003: 821).

In view of the foregoing, it seems that while some literature suggests that polygamy can be economically beneficial for women, it more often leads to deleterious economic effects for them. Studies illuminating women's negative economic experiences are based on analyses of specific features within polygamous families and communities that actively detract from women's access to resources. They indicate that women in polygamous families have experienced economic hardship on account of their family structure. In contrast, research suggesting that women stand to gain from polygamy bases this position primarily on speculation. That is, this research posits that the dynamics and relationships within polygamous families might allow women to benefit economically. These studies do not, however, affirm that women do in fact benefit economically. As such, a global assessment of this research suggests that the ability of a plural wife to acquire the resources necessary to sustain herself and her children, or to acquire financial independence, can become seriously impaired. This, in turn, limits her ability to survive should she decide to leave her polygamous marriage.

The Economic Circumstances of Women Who Leave Polygamy

Some commentators have discussed the economic difficulties women may face in the event that they seek to leave a polygamous marriage. This is hardly surprising given the literature that exists on the financial disadvantage that marriage and divorce can inflict on women, even in the context of monogamy.[17] The question that arises here is whether women leaving polygamous unions face specific economic challenges.

Accounts of women who have left the polygamous community of Bountiful suggest an affirmative answer, for two particular reasons. First, as discussed above, women who have lived in this community throughout their lives have likely had very limited contact with institutions and individuals beyond their group. Should they seek to leave Bountiful, they might be seriously hampered by a distrust and fear of the outside community, and by an inability to navigate it to seek and access resources to help them settle and become established after relocating (Committee on Polygamous Issues 1993: 26-28; 78ff; Cohen 2003).

Second, as noted, women who live as plural wives in Bountiful have few or no economic resources. If they leave, they might not have the skills necessary to earn an income outside their community. They will also have an extremely difficult time obtaining spousal and child support from their husband. With respect to spousal support, there is no clear obligation on a husband's part, since, given the polygamous nature of these marriages, the spousal status of all but first wives in registered unions is far from determinate.

Moreover, although a husband might have a legal obligation to pay child support (since the law requires parents to support their children regardless of marital status), his actual ability to do so will be limited. As described above, even if a man works within Bountiful, his income and assets might be largely committed to the UEP trust and community leaders. In addition, because these men might have concurrent obligations to other wives and children, the quantum of support they would be required to pay could be very limited. For most women then, the thought of going through the trouble and expense of bringing a legal suit to claim support would not be very tempting (Committee on Polygamous Issues 1993: 27-28).

In some situations, plural wives might leave a polygamous marriage due to external forces, rather than by their own choice. Where women move from jurisdictions that recognize polygamy to jurisdictions that prohibit this practice, they might have no choice but to live as though unmarried to their spouses. In France, for example, legislation known as the Pasqua law was enacted in 1993 to eradicate polygamy among immigrants to the country (Bissuel 2002). Pursuant to this law (which is discussed in further detail in Part II of this report), a polygamous man seeking residence in France was permitted to live with just one of his co-wives. He was required to divorce his other wives, who were also required to leave his household. This policy applied prospectively and retroactively, to polygamous families that had already immigrated to France. If a husband failed to comply with the law, he and all his wives faced possible deportation, as well as the loss of their working and residence papers and welfare benefits (Starr and Brilmayer 2003: 247). If, however, a polygamous man had children with French citizenship, he could not be deported, but could be deprived of necessary papers to work in the country. As a result, he and his family could end up living in abject poverty (Bissuel 2002; Starr and Brilmayer 2003: 247ff).

The French Pasqua law came at tremendous expense to women married polygamously, and to their children. The forced de-cohabitation of polygamous husbands and all but one wife left many women with no choice but to leave the household with few financial resources. In Paris, where housing is scarce and costly, their searches for a new place to live were often fruitless, and they thus often ended up living as squatters in abandoned buildings (Bissuel 2002; Starr and Brilmayer 2003: 247-48). Some women have also been returned to their countries of origin (Starr and Brilmayer 2003: 248).

Summary

While some research indicates that plural marriage allows women to enjoy greater economic security, most of the writing on this topic reveals that polygamous life is more likely to impair a woman's economic status and prevent her from obtaining the resources necessary to acquire financial independence. Women who leave, or who are forced out of, polygamous marriages might also face disastrous economic consequences, since many have so few resources during the marriage. They might also encounter severe difficulty accessing social and economic resources outside of their community. Additionally, since their status as "spouses" is precarious where polygamy is not recognized, they will have limited ability to seek spousal support or other matrimonial relief.

Women in Polygamy: Health Experiences

A final issue that merits attention is the extent to which plural marriage affects women's health and overall well-being. Most of the discussion that arises in relation to this topic has dealt with the psychological and reproductive health of plural wives, and it generally suggests that the health effects polygamy may bring to bear on the lives of women can be quite deleterious.

Psychological Health

The psychological influences that polygamous life might exert on women have been considered by several researchers. According to Al-Krenawi (2001, 1998: 69) polygamous wives more commonly face family stress and mental health issues than monogamous women. The risk of psychiatric illness is particularly acute for first or senior wives in a plural marriage. In their study of polygamous wives living in Gaza City, Al-Krenawi et al. (2001) noted that senior wives expressed great psychological distress and a sense of mourning or loss when their husbands took second or subsequent wives. More specifically, they experienced feelings of failure and low self-esteem, feelings that were often reinforced by family and community perceptions. Senior wives also experienced other mental health difficulties, such as anxiety and depression, more frequently than junior wives. This research confirms results from an earlier study that examined the experiences of senior wives (Al-Krenawi et al. 1999).

This sense of devastation and loss experienced by a woman when her husband takes a subsequent wife is not restricted to the Palestinian context considered by Al-Krenawi et al; it has been reported by women living in other socio-cultural settings as well (Al-Krenawi and Graham: 1999; Hassouneh-Phillips 2001: 740).[18] A husband's marriage to a subsequent wife is often perceived as traumatic and unsettling by preceding wives and their children (M'Salha 2001: 174). This development results in a major change in the family structure and a likely decline in the financial resources and attention that a man can provide his wives and children (Hassouneh-Phillips 2001: 740).

Some women might also perceive polygamy as bearing the potential to strip them of their autonomy. This point has been discussed earlier; however, it warrants emphasis again here. If a woman feels compelled both to enter a polygamous marriage and to engage in sexual relations once married (Ward 2004: 145-46; Committee on Polygamous Issues 1993: 8ff; Cohen 2003), this clearly will affect her sense of dignity and self-worth. It might also detract from her self-awareness and personal identity (Committee on Polygamous Issues 1993: 49-50).

Yet, it must be noted that some women seem to enjoy a high standard of psychological and emotional health, because of the lifestyle polygamy affords (Forbes 2003; Chambers 1997). In particular, women may benefit from the potential for collaboration and friendship among co-wives, as discussed above (Chambers 1997: 66-67, 73-74; Forbes 2003: 1542-43; Madhavan 2002). It has also been argued that polygamy might benefit women psychologically since it diminishes the possibility of divorce by offering dissatisfied husbands the opportunity to remarry without having to divorce the first wife. Arguably, this serves the interests of women in cultures where divorce might cause greater social humiliation and isolation for women than would life in a polygamous marriage (M'Salha 2001: 175, 177).

Reproductive and Sexual Health

Polygamous life may also affect women's reproductive and sexual health. Lardoux and Van de Walle's (2003) study of polygamy in Senegal focussed on women's fertility rates in different marital arrangements. Their research indicated that women in plural marriages generally have lower fertility rates than women within monogamy. It found that each time a polygamous husband took a new wife, his prior wives all experienced decreased fertility. In addition, the highest ranking wife (usually the newest wife) was most likely to have a child first, given that she was probably most favoured by the husband. Comparable results were obtained in a study on the relationship between polygamy and fertility in Ghana (Bhatia 1985), as well as in an anthropological study in Mali (Strassmann 1997: 688).

Some research, however, suggests that polygamy, and the number of wives a husband has, do not necessarily affect women's fertility. Ahmed (1986) maintained that other variables, such as a woman's age, education, religion, and rank as a wife, bear a more significant impact on her fertility level.Research in Ghana and South Africa also concluded that polygamy came at no real cost to women's fertility rates (Sichona 1993: 480; Anderson 2000: 104).

In her review of anthropological studies on the cost of polygamy to women in Africa, Borgerhoff Mulder (1992: 48) also found that the data in relation to fertility and polygamy told "an equally variable and inconsistent story." Indeed, the sole conclusion that could be positively drawn was that polygyny does not come at the same cost to women vis-à-vis reproduction. Nevertheless, Borgerhoff Mulder cautioned against an unqualified comparison of research data on this topic, given that these data emanate from studies of variable methodological quality. A better understanding of the relationship that might exist between polygynous marriages and fertility thus seems to depend on a more thorough evaluation and critique of the research methods that have been employed to consider this topic to date.

Aside from fertility issues, women in polygamous relationships may also be at an increased risk of exposure to human immunodeficiency virus (HIV) infection and other sexually transmitted diseases. This is indicated by research conducted in Nigeria (Adejuyigbe et al. 2004: 279-81; Ajuwon et al. 1993-94: 410ff)[19] and Angola (CEDAW Angola 2004). A study undertaken within a polygamous community in rural Gambia also indicated that women in polygamous marriages are three times more likely to be affected by the Herpes simplex virus 2 (HSV2) (Halton et al. 2003). HSV2 is associated with increased HIV infectiousness, and with a heightened susceptibility to HIV infection (Halton et al. 2003: 98).

Several media reports also indicate that polygamy has contributed to the spread of HIV and acquired immune deficiency syndrome (AIDS) among women, especially in African countries. These reports have considered the link between sexually transmitted illnesses and polygamy in Nigeria (White 2004), Swaziland (Dixon 2005), Zambia (Laurance 2004),[20] South Africa (Laurance 2004) and sub-Saharan Africa generally (Eilperin 2003). These reports listed polygamy as a factor to target and eliminate to assist in reducing the spread of sexually transmitted disease in these countries.

Having said this, greater study is needed before it can be confidently asserted that polygamy contributes to the spread of HIV and other sexually transmitted illnesses, and if it does, to explain why this is so. In particular, more work needs to be done to determine how sexually transmitted diseases might be spread outside of individual polygamous families to other members of a society (e.g., through consorting with prostitutes, by wives having to resort to prostitution as a result of destitution, as a result of rape or through perinatal transmission).

Summary

Based on the available literature, it would seem that polygamy could bear quite negatively on the health of women. While some women might benefit from polygamous life, most research indicates that women suffer psychologically when their husbands take subsequent wives, when there is intense rivalry between co-wives and if they perceive polygamy as depriving them of individual freedom and autonomy.

Recent studies have also suggested a link between polygamy and women's reproductive health. Research as to the impact of polygamy on fertility is still inconclusive. Moreover, although it seems that plural marriage might increase women's exposure to sexually transmitted disease, further research on this topic is needed. Studies have concentrated on Sub-Saharan Africa, which seems logical in view of the high rate of HIV infection in this area of the world. But given that polygamy in all cultures involves the sexual sharing by several women of one man, a broader inquiry into the potential reproductive health ramifications of this practice is warranted.

Women in Polygamy: Conclusions

In view of the foregoing discussion regarding the social, economic and health experiences of polygamy, it is difficult to draw a single, clear conclusion as to whether life in a polygamous marriage is harmful to women. Whether women suffer or benefit from plural marriage actually seems to be the improper query through which to investigate the consequences of polygamy for women, since it is far too general. It implies that women in polygamy share uniform realities, regardless of the communities and cultures in which they live, and regardless of the particular relationships formed within their families. This is in fact not at all the case: an array of factors might give rise to substantial diversity within the experiences of women in polygamy worldwide. As noted by Elbedour et al. (2002: 262): "[V]ariations exist on the effect of polygamy on the lives of mothers. These variations occur as a function of the number of unions in the family, how the culture values polygamy, the wife order, and whether polygamy is imposed on the senior wife or initiated by her."

Thus, while some women encounter bitter animosity and rivalry with co-wives, others might enjoy genuine friendship and support from this network of women. While some women might face abject poverty as a plural wife, others might garner economic security and stability. Finally, while some women in polygamy might face a heightened risk of exposure to sexually transmitted disease, others might never have to deal with this concern. In view of this, policy responses to polygamy must be sensitive to the diverse realities that women in polygamy encounter. Of course, caution must be taken in embarking on a culturally sensitive approach to this topic to ensure that such respect for cultural diversity does not compromise equality rights and interests, which should lie at the heart of this analysis.

PART II - LEGAL AND POLICY RESPONSES TO POLYGAMY WORLDWIDE

Having studied the various ways in which women's lives might be affected by polygamy, we might consider how laws and policies worldwide have responded to plural marriage, to determine whether they adequately address the particular needs and interests of women. The second part of this report undertakes a review of the various approaches that have been developed by diverse jurisdictions in regard to polygamy. It discusses responses to plural marriages formed domestically as well as those formed in foreign jurisdictions. Ultimately, this analysis serves as a basis for determining whether foreign approaches to polygamy might inform Canadian legislative and policy making in this area.

At the outset, it should be noted that the following discussion does not purport to represent an exhaustive overview of how each jurisdiction in the world deals with polygamy. Rather, a variety of states were selected on the basis of their ability to illustrate the diversity of legislative and policy approaches to plural marriage that exist across the globe.

Legislative and policy approaches to polygamy are generally distinguished along two separate lines, namely, approaches that deal with plural marriages formed domestically, and approaches that deal with plural marriages formed abroad, in foreign jurisdictions.

Approaches to Polygamous Marriages Formed Domestically

Most countries recognize a set of legal norms that deal with plural marriages formed domestically. Three different responses to domestic polygamy can be identified:

- pursuant to a **permissive** approach, polygamy is permitted and recognized as a legal marital arrangement;
- a **prohibitive** approach, pursuant to which the state does not recognize polygamous marriages, and might also consider this practice to be criminal and meritorious of a penal sanction; or
- **a combined customary law and civil law** that allows individuals to choose the legal tradition under which they wish to marry and, if customary law is chosen, they may marry polygamously and the marriage will be recognized to the extent that polygamy is permitted under customary traditions.

Permissive Approach

Polygamy is permitted in many jurisdictions worldwide that are governed either partially or wholly by Islamic or Shari'a law. Pursuant to a traditional interpretation of Shari'a law, men may marry up to four wives simultaneously and can terminate each at will without justification or their wives' consent or presence (Mir-Hosseini 2003: 7). Polygamy is explicitly permitted — though not required — in jurisdictions that adopt Shari'a norms as governing family relationships. However, most of the legislation enacted in these jurisdictions frames the right to marry polygamously within specific conditions necessary for such marriages to be recognized. For example, pursuant to **Syria's** *Personal Status Law*, men retain the right to marry up to four wives, and may divorce them through repudiation. However, judicial permission to marry polygamously must be obtained and a judge may refuse this if a husband is unable to establish lawful cause for taking an additional wife, or if he lacks the financial capacity to support all proposed wives (Afary 2004).

In **Morocco**, more exacting conditions to practising polygamy exist. While polygamy is permitted under the *Code of Personal Status*, a wife can, at the time of marriage, opt for a monogamous union and stipulate this as a requirement in her marriage contract. Breach of this commitment to monogamy allows a wife to seek divorce. In addition, a wife's awareness of, and consent to, her spouse's decision to take a subsequent wife is necessary. A subsequent wife must also know before her marriage whether a man is already married. Judicial authorization is necessary to practise polygamy and may be refused where there is a concern that the wives will be treated unequally (M'Salha 2001: 172-73; Dangor 2001: 116; Afary 2004; Rude-Antoine 1991: 96; Venkatraman 1995: 1978-79; Irvine 2003). It has, however, been reported that these requirements are not effective, since there are no enforcement procedures for them in the law. In an effort to address discrimination against women, the Moroccan prime minister presented a national plan in 1999 for reforming the *Code of Personal Status* that proposed the limitation of polygamy. This plan faced fierce opposition from conservative and Islamist groups, and the implementation of the Plan was put on hold (Human Rights Watch Morocco 2001). However, in February 2004, reforms to the law governing marriage and other areas of family law were enacted in Morocco. These reforms placed polygamy under the strict control of the judiciary. Nevertheless, several factors, such as the judiciary's lack of awareness about the reforms, opposition from religious legal authorities and lack of public awareness, continued to prevent Moroccan women from fully enjoying these newly acquired rights (Willman Bordat and Kouzzi 2004).

Libya's *Marriage and Divorce Regulations Act* renders polygamy subject to permission by a court, which requires proof of a husband's physical and financial ability to support plural families. The same condition exists within **Iraq's** *Law of Personal Status*. Iraqi courts may authorize polygamy only where the husband is financially able to support plural wives, and this serves a legitimate interest. Authorization must be refused if there is a fear of unequal treatment of co-wives (Dangor 2001: 116). Non-compliance with these requirements could entail a criminal penalty, and allows a wife to seek separation. However, a man may be exempt from these requirements if the prospective subsequent wife is a widow CEDAW Iraq 1998: 26).

Although polygamy is permitted under **Algeria's** *Family Code*, a man must provide a rationale for contracting a polygamous marriage, must be able to treat his wives equally and must give prior notice to his existing wife/wives. A wife may petition for divorce on the grounds of having sustained harm due to her husband's omission to obtain her consent to his subsequent marriage. Courts retain some discretion in interpreting and applying Algerian law in relation to plural marriage (Rude-Antoine 1991: 116).[21]

Under **Jordan's** *Law of Personal Status*, a man who takes more than one wife must treat them equitably and not compel them to live together without their consent (CEDAW Jordan 1999: 64-65; Welchman 2000: 185-86). Similar requirements exist under **Yemen's** *Law of Personal Status,* which allows men to marry up to four wives provided he can treat them fairly, show a "lawful benefit," and provide for each of them. He must also inform any existing wife and the prospective wife about his intention to marry polygamously.

Egypt's *Personal Status Law* allows a man to enter a polygamous marriage, but he must first obtain consent from his initial wife. She, in turn, may petition for divorce if her husband takes an additional wife and she sustains harm that makes continued cohabitation with him impossible (Dangor 2001: 116; Venkatraman 1995: 1984-90).

Although no longer governed purely by Islamic law, **Indonesia** continues to recognize plural marriages. The *National Marriage Act* was introduced in 1974 in an effort to render marriage subject to regulation by civil, rather than exclusively religious, law. A primary objective of this legislation was to limit polygamy. Pursuant to the law, a Muslim husband may take a second wife if he obtains consent and judicial approval, and only for certain reasons specified by law. (Cammack et al. 1996: 45; Hanifa 1983: 22-23; Soewondo 1977; CEDAW Indonesia 1997: 72-73). Courts have shown themselves willing to invalidate polygamous marriages that do not adhere to these statutory requirements.[22]

In addition to nations such as those just described where family relations are largely governed by Shari'a law, several jurisdictions allow a plurality of religious norms to shape the regulation of marriage and divorce. In **India**, for example, family relations are not regulated by a single set of rules. Rather, the five major religious communities (Hindu, Muslim, Christian, Jewish and Parsi) have separate personal laws based on their respective religious laws.[23] With respect to the Muslim community, norms governing marriage are generally not legislated and instead, Shari'a law is applied. Muslim men thus may marry up to four wives (Shah 2003: 371). Because polygamy is unregulated within the Muslim community, men may take subsequent wives without prior wives' consent, and there is no inquiry as to whether they abide by the requirement under Islamic law that they treat their wives equally.[24]

Under the Indian *Hindu Marriage Act, 1955*, which applies to Indians of the Hindu, Buddhist, Sikh or Jaina faiths, polygamous marriages are not recognized.[25] Polygamy is also considered as an offence under this statute,[26] and can serve as a basis for divorce by a wife (CEDAW India 1999: para. 372). Despite this, Indian courts have recognized the legal consequences of polygamy even among those governed by the *Hindu Marriage Act*, given that full enforcement of this law has been viewed as leading to injustice for women and children (Shah 2003: 371). Polygamy is not recognized for Christians or Parsis in India, who are governed by the *Indian Divorce Act, 1869* and the *Parsi Marriage and Divorce Act* respectively.[27]

Hindu and Muslim laws are also simultaneously recognized in **Bangladesh** and **Pakistan**. Unlike India, however, Hindu personal law operates to *allow* polygamy for Hindus in these jurisdictions. (Shah 2003: 371; Roy 2004: 135-36, 138). Muslim men may also marry polygamously, but only on the fulfillment of certain statutory conditions (Shah 2003: 371). Men intending to contract subsequent marriages must, under the *Muslim Family Law Ordinance*, seek written permission from an arbitration council. They must also notify and obtain consent from their existing wives before taking a subsequent wife. Contravention of these requirements could trigger penal sanctions and provides sufficient grounds for a prior wife to dissolve the marriage (Dangor 2001: 116; Venkatraman 1995: 1990-91; Carroll 1985: 285).

In **Sri Lanka**, while polygamy is generally barred, an exception is made for Muslim men under the *Muslim Marriage and Divorce Act*. The same is true in the **Philippines**, where, although polygamy is criminally prohibited,[28] the *Code of Muslim Personal Law* allows a man of Islamic faith to have more than one wife if he can give them equal companionship and treatment. Existing wives are also entitled to notice of a husband's decision to take an additional wife, and if they do not consent to this, an arbitration council is constituted to determine whether the objections should be sustained.[29]

Similarly, polygamous marriages are allowed under **Singapore**'s *Administration of Muslim Law Act,* but only after an inquiry by the registrar of Muslim marriages has taken place. This inquiry must establish a justification for the subsequent marriage, as well as the husband's ability to support his wives and treat them equally.[30]

Three African countries studied for this report create a default marriage regime that prospective spouses may opt not to follow. In both **Cameroon** and **Burkina Faso**, the default regime is monogamy, but spouses may opt for a polygamous marriage before they marry (CEDAW Burkina Faso 2000: para. 256; CEDAW Cameroon 1999: 89ff). If spouses enter a monogamous marriage but a husband subsequently takes an additional wife, the initial wife may apply for the annulment of her marriage. In Burkina Faso, a husband who has not opted out of monogamy might be imprisoned or fined for practising polygamy (CEDAW Burkina Faso 1998: 4-5, 25-26). Nevertheless, polygamy remains widespread. This may be because many women are unaware of their marital rights or because marriages are not always fully documented, and men may thus take several wives without prosecution (CEDAW Burkina Faso 2000: 281-282).

The default marital structure in **Gabon** is polygamy, but parties may elect monogamy. A spouse who marries monogamously but subsequently takes another spouse is deemed to commit an offence punishable by imprisonment. Nevertheless, men are entitled to convert their marriages from monogamous to polygamous and, although women are meant to consent to this, most will do so readily, as this is considered preferable to "abandonment" by their husbands (CEDAW Gabon 2003: 26-28; UN Information Services 2005). Although the government of Gabon has tried to limit polygamy, the practice of men taking multiple wives persists, predominantly in the name of tradition (UN Human Rights Committee 2000).

A final country of note is **Bhutan**. Polygamy is permitted in this jurisdiction, though not on the basis of any apparent religious normative order. Although polygamy and polyandry are both permissible under Bhutan's *Marriage Act, 1980*, polyandry is rarely practised. This law requires that a spouse's consent is obtained before engaging in a subsequent marriage (CEDAW Bhutan 2003: 2).

Prohibitive Approach

While polygamous marriages are permitted and recognized in several jurisdictions, many other states do not view polygamy as an acceptable form of marriage. Bigamy and/or polygamy might also be considered as criminal offences in many jurisdictions.[31] Yet as discussed here, polygamy may still be practised even when prohibited by law.

Several states have adopted an approach that targets, and tries to limit polygamy at two separate levels: civil and criminal. As such, these states do not recognize polygamy as a form of civil marriage, and parties to such unions do not have legal spousal entitlements or obligations. At the same time, polygamy is targeted at the criminal level, through legislation that makes plural marriage an offence bearing the potential to trigger penal sanctions. This two-pronged approach is undertaken, for example, in the **United Kingdom**,[32] **Samoa**,[33] **Trinidad and Tobago**,[34] **Tunisia**,[35] **France**,[36] **Australia**,[37] **New Zealand**,[38] **Hong Kong**[39] and **China**.[40] Polygamy is also considered an offence and subject to penal sanction in **Madagascar**[41] and in **Paraguay**.[42]

Polygamy is also prohibited in a number of other jurisdictions, and thus, plural marriages would not be recognized in these states. This is the case in all member states of the **European Union** (Gonzalez and Mac Bride 2000: 178), as well as **Georgia**,[43] **Kazakhstan**,[44] **Thailand**,[45] **Viet Nam**,[46] **Armenia**[47] and **Turkey**.[48]

Several states explicitly recognize only monogamous marriages, thereby indicating that polygamous unions would not be recognized within these jurisdictions. For example, in **Belarus**, the *Marriage and Family Code* indicates that marriage is a voluntary union of man and woman (CEDAW Belarus 2002: 63). The singular form used in this provision indicates the exclusive recognition of monogamous marriages. In **Belize**, the law defines marriage as voluntary union of *one* man with *one* woman to the exclusion of all others (CEDAW Belize 1996: 44-45). Similarly, an individual in **Cuba** may enter a recognized marital or conjugal union only with *one* other partner (CEDAW Cuba 1999: 54). Polygamy is also implicitly prohibited in **Uzbekistan** where a prior, undissolved marriage is considered a bar to marriage (CEDAW Uzbekistan 2000: 81).

In many states that prohibit polygamy, this practice continues to be carried out quite publicly. For example, although polygamy is generally prohibited in **Nepal**, the law recognizes certain exceptions to this rule[49] and, as a result, this practice remains widespread (CEDAW Nepal 2003: 8, 38). And, while polygamy is prohibited in the **Russian Federation**, the practice has been found to persist in certain Islamic regions of the country.[50]

Polygamy is also openly practised in the **United States**, despite the legal prohibition against plural marriage in all states. In the late 19th century, congressional legislation was passed to criminalize polygamy in the American territories (Forbes 2003: 1521-22; Chambers 1997: 63-64). Although this was challenged as an unjustified interference with the free exercise of religion, the law was ultimately upheld by the U.S. Supreme Court in a decision that continues to be applied in cases involving the criminal prosecution of polygamists.[51] Polygamy is prohibited under the Constitution of Utah, and the state legislature recently enacted the *Child Bigamy Amendment* to its criminal law, increasing the severity of this offence when carried out with a minor (Clark 2004: 278, 281-82). Despite this, plural marriages continue to exist throughout Utah and other states (Ward 2004: 137-38; Chambers 1997: 70-71) and few individuals involved in these practices are prosecuted (Ward 2004: 139-40; Clark 2004: 280; Chambers 1997: 69ff).

Canada's situation is similar to that in the United States. Although the *Criminal Code* prohibits bigamy and polygamy, polygamous families and communities exist within the country. The most well-known among these is Bountiful, where polygamy is openly practised. Despite this, criminal prosecutions for polygamy or bigamy have never been brought against community members (Cohen 2003; Matas 2002b). Indeed, in Canada, prosecutions for practising bigamy or polygamy have been few and, where convictions have been rendered, the jurisprudence reveals a tendency toward relatively light penal sentences, on the basis that deterring polygamy is unnecessary, because it is so uncommon in Canada.[52] Having said this, polygamy is still described as an affront to the values Canadians attribute to marriage and family life.[53]

Canadian law is also quite clear that plural marriages are not recognized as valid in Canada.[54] Nevertheless, although illegal and invalid, these marriages might create rights and duties as between the spouses. This requires that the person claiming a right has acted in good faith and has not known about a spouse's prior, still existing marriage.[55]

Combined Approach: Secular and Customary Law

Several African nations have adopted a multiplicity of legal systems to deal with marriage and family relationships. In many of these jurisdictions, prospective spouses are free to choose whether they wish to marry under the civil laws of the country, or under African customary law. If customary law is chosen, parties may enter a polygamous marriage if such a practice forms part of customary traditions. This pluralistic approach is adopted, for example, in **Eritrea**,[56] **Nigeria**,[57] **Kenya** (Hardee 2004),[58] **Uganda** (Wing 2001: 844),[59] **Zambia**,[60] **Namibia**,[61] **Guinea**[62] and **Zimbabwe** (Wing 2001: 845-50)[63] where polygamous marriages are recognized for those married under African customary law. Moreover, certain jurisdictions (such as Eritrea, Nigeria and Uganda) recognize a man's right to marry polygamously under both customary and religious (i.e., Islamic) law.

In **South Africa**, customary marriages are recognized under the *Recognition of Customary Marriages Act, 1998*. This statute operates to exempt customary marriages from the general bar against polygamy. However, plural marriages formed under religious law (e.g., Hindu, Muslim) are not accepted (South African Law Reform Commission 2003: 5; Wing 2001: 851-52). [64] Recently, however, the South African Law Reform Commission completed a report that proposed legislation allowing for the recognition of marriages formed under Islamic law, including polygamous marriages (South African Law Reform Commission 2003).[65] Under this bill, a husband would have to apply to a court for permission to marry polygamously, and the court would be required to assess whether he is willing and able to treat his wives equally. Prior wives would be entitled to receive notice of a husband's intention to take a subsequent wife, but their consent is not required. Failure to comply with these requirements would be a criminal offence subject to a potential conviction or a fine (Manjoo 2005).

There are difficulties, however, with recognizing polygamy under customary law. Because customary law is usually unwritten, there is wide variation as to how it is understood, interpreted and applied within a community. Customary marriages are also unregistered in many jurisdictions, rendering them difficult to prove. This might also frustrate the ability to establish whether a man is already married (Jessep 1993: 31; Hardee 2004: 733-37). Formalizing customary law so its content is more certain, and requiring the registration of customary marriages[66] have been recommended as methods for overcoming these challenges (Hardee 2004: 740-45).

In addition, because women married under customary law are not given the same spousal rights as those married under state law, they are at risk of economic instability and impoverishment. In recognition of this, the South African legislature has enacted statutes to extend the rights of women married under secular law to those married under customary law (Kaganas and Murray 1991: 122-23). Kaganas and Murray suggested that this approach to customary marriage is more appropriate than an outright prohibition of plural marriage that would extend to those espousing customary law. In particular, they feel that outlawing polygamy is a drastic step that is not likely to be effective in a society where family law is premised on cultural and religious norms. A law barring polygamy in such a setting would not offer full protection for women's equality interests.

> A legal system can never prevent people from establishing family relations outside its ambit and women who are positioned in oppressive structures are often the least able to resist the demands of tradition. To say that a woman who has grown up in a patriarchal cultural setting and who has no obvious alternatives should defy the community and resist polygyny because this is required by law is unrealistic (Kaganas and Murray 1991: 133).

Approaches to Polygamous Marriages Formed in Foreign Jurisdictions

Many jurisdictions that do not recognize, and even criminally prohibit, domestic polygamy take a different approach to plural marriages formed in another state, according to that state's own rules. Questions about whether and to what extent polygamous marriages formed in foreign jurisdictions should be recognized arise in two principal legal contexts: matrimonial relief claims by spouses to a polygamous marriage, and immigration applications by polygamous family members. In thinking about the treatment of plural marriages formed abroad it is important to keep the interests of immigrant women in mind. In particular, polygamously married women who have relocated to jurisdictions where their unions are not recognized by the state have historically found themselves in very precarious social and economic circumstances. As discussed below, the justice of this has been scrutinized over time. While certain jurisdictions have taken measures to protect the interests of women in these situations, status as a polygamous wife still increases an immigrant woman's vulnerability.

Claims of Polygamously Married Spouses for Matrimonial Relief

The rights of women married polygamously have been considered quite extensively by courts, legislatures and academics in the **United Kingdom**.[67] Until the 20th century, polygamy was viewed by colonizers as a practice inimical to Christianity and civilization (Seuffert 2003; Martin 1994: 421; Shah 2003: 374-75; Esplugues 1984: 303-05). As such, courts traditionally refused to recognize polygamous marriages formed in foreign jurisdictions under English law.[68]

From the 1930s onward, however, English courts adapted their position to meet the reality of a country hosting an influx of immigrants from many countries, often those that permitted polygamy (Shah 2003: 375; Esplugues 1984: 306). To temper the harsh effect of earlier judgments refusing recognition of plural marriages, courts found that "potentially" polygamous marriages[69] could "convert" to monogamy once a couple had immigrated. This allowed parties to apply for matrimonial relief in the United Kingdom (Shah 2003: 375; Esplugues 1984: 307; Marasinghe 1978: 398). Ultimately, legislation was passed to grant marital relief to polygamous spouses whose marriages were valid where celebrated.[70] The same statute prohibited polygamous marriages, however, for English domiciliaries, even if solemnized in a jurisdiction allowing plural marriage.[71] The law was subsequently clarified to ensure that English domiciliaries who married in such jurisdictions and remained monogamous would be recognized as having a valid marriage.[72]

As such, contemporary English courts will, in the absence of any violation of fundamental English public policy, recognize a polygamous marriage if it was validly created between foreign domiciliaries having full capacity, in compliance with the rules of the jurisdiction in which the marriage was celebrated (Martin 1994: 427, 443). English law recognizes such marriages as conferring the same rights and obligations between the spouses as monogamous marriages.[73] While this seems to benefit spouses since it offers explicit recognition of their union, it often promotes state interests as well in that, by recognizing these relationships, it might limit its responsibility for the spouses, and shift this obligation of support to the private, family sphere (Chapman 2001: 45-50).

Similar approaches to polygamous marriages formed abroad are taken in **Australia** and **New Zealand**. Australian law now recognizes polygamous marriages formed abroad, provided that the marriage complies with the law in the place of celebration.[74] Such marriages are not valid, though, if any of the parties is already in a marriage recognized in Australia.[75] Polygamous marriages are also recognized in New Zealand where the parties are domiciled in a place that allowed polygamy at the time the marriage was formed. However, a polygamous marriage is void if the parties were domiciled in New Zealand and, at the time of celebration, either party was already married.[76]

France and **Belgium** take a somewhat different approach to marriages formed in foreign jurisdictions. As noted above, polygamy is prohibited under the *Code Civil* and the *Code Pénal Français*,[77] and considered as a violation of public order (Bourdelois 1993: 180ff). Given that French nationals are governed by French law in relation to personal status,[78] they may not enter polygamous marriages, either domestically or abroad.

The "public order" approach to polygamy has traditionally been attenuated where no spouse is a French national. Although a plural marriage is considered contrary to French public policy and thus not recognized even when validly formed abroad, courts have been willing to give effect to such marriages by recognizing spousal rights and obligations as between the parties (Esplugues 1984: 316-19; Nielsen 1996: 82-83). As discussed below, however, recent developments in French immigration policy abruptly halted the trend of national tolerance of foreign polygamous marriages.

The treatment of polygamy in Belgium is similar to the traditional French approach. Although polygamy is considered to run counter to public policy, Belgian courts have recognized the effects of polygamous marriages formed abroad. This has been viewed as protecting the legitimate interests of women in polygamy, an objective that is perceived to further, rather than hinder, public order (Foblets 1996: 141-44; Foblets 1994: 205; Esplugues 1984: 319). Foblets (1994: 203ff) noted, however, that in the administrative/immigration law context, Belgium has been less willing to recognize polygamy, thereby creating potentially difficult circumstances for women.

Similar to France and Belgium, **Spain** also responds to foreign polygamy by relying on the concept of public order. A polygamous marriage, even if formed in a jurisdiction where valid, cannot be registered in Spain, given that article 12.3 of the Spanish *Civil Code* prohibits recognition of a foreign law contrary to public order. Yet, while polygamous marriages themselves are not accepted in Spain, it remains possible to claim recognition of the effects of such unions as between the spouses (Motilla 2004: 598-99; Gonzalez and Mac Bride 2000: 179).

Canada's treatment of polygamous marriages formed abroad is closer to that adopted in the United Kingdom and Commonwealth nations discussed, than a strict "public order" approach. Originally, Canadian courts were reticent to recognize marriages formed in jurisdictions allowing polygamy[79] yet, as in the United Kingdom, this position has retreated over time.[80] This shift was justified primarily by the interest in assuring that second wives could validly claim matrimonial relief from polygamous husbands (Mendes da Costa 1966).

Currently, the effects of plural marriages formed outside of Canada are recognized in certain circumstances. In common law provinces, a person's marital status is governed by her or his "personal law," which is the law of her or his domicile (Bailey 2004: 1010-11). For example, in Ontario a person married polygamously is considered a "spouse" and may claim matrimonial relief if the marriage was celebrated in a jurisdiction that recognizes it as valid.[81] The same principle applies under Quebec civil law,[82] subject to the requirement that such recognition would not be "manifestly inconsistent with public order in international relations."[83]

Immigration Applications by Members of Polygamous Families

A second context in which the law has grappled with how to deal with polygamous marriages validly formed under the law of foreign jurisdictions is that of immigration. In particular, questions arise as to whether a woman married to a polygamist, and/or her children, may immigrate with him to another country that does not recognize plural marriage.

The development of this issue in **France** has been fraught with controversy and challenge. Initially, France was willing to open itself to polygamous families whose marriages had been formed in places recognizing plural marriage. This was due to its postwar need for immigrant labour. By the 1990s, there were approximately 200,000 people living in polygamous families in France. Their living conditions were generally very poor, though, and immigrant women's advocacy groups in the country began to criticize the circumstances endured by women in polygamy. This movement coincided with a rise in French anti-immigration sentiment that targeted polygamy specifically as a national social and economic ill (Starr and Brilmayer 2003: 245-46; Bissuel 2002).

New immigration legislation (the Loi Pasqua) was thus passed in 1993, substantially altering France's policies vis-à-vis polygamy. It stated that just *one* spouse of each new immigrant could receive a spousal visa and working papers, and be eligible for family allowance; other spouses and their children were excluded. These changes applied both prospectively and retroactively, to families who had already immigrated. Thus, polygamous men and their wives were required to divorce and live separately, failing which they risked losing their French working and residence papers and family allowance. Family members also faced possible deportation. Although men with children born in France could not be deported, they stood to lose their working papers and thus risked severe impoverishment (Bissuel 2002; Starr and Brilmayer 2003: 247ff).

Reports indicate that immigrant women in France have suffered immensely as a result of the Loi Pasqua. For many, divorce was not an option both on principle, and because it would cause major economic and social upheaval for them and their children. Living separately also was often impossible, since most families could not afford separate houses for each wife and her children. Many women thus ended up homeless or living as squatters in abandoned buildings. Others have been deported (Starr and Brilmayer 2003: 248).

Under pressure from immigrants' rights groups, the French government took steps to temper the effects of the Loi Pasqua, for example, by giving spouses one-year visas to "de-cohabitate," by reissuing work visas to parents of French children who could not be deported, and by helping displaced wives gain access to emergency shelters (Starr and Brilmayer 2003: 249-50).

Spain's approach to polygamy in its immigration context has not been altogether different from France's recent position. Legislation passed in 2000 prohibits foreign residents from bringing more than one spouse to live in Spain, even if polygamy is permitted in the person's country of domicile. A resident's chosen spouse and her children can obtain residence permits only if the resident *alone* exercises parental custody. This policy is paradoxical, in that it rejects polygamy on the basis of gender equality, yet allows males to choose among their wives and encourages women to abandon custody of their children (Motilla 2004: 596-97; Gonzalez and Mac Bride 2000: 179).

In the **United Kingdom**, the traditionally liberal approach to immigration by plural wives of polygamists was considerably restricted with the introduction of the *Immigration Act, 1988*. (Shah 2003: 383ff; Chapman 2001: 50-51). This legislation imposed an effective ban on the admission of a wife where another wife or widow of the same man had already been admitted to the country (Shah 2003: 391).

Although immigration restrictions limiting entry of polygamous spouses have been challenged as a human rights violation, the European Commission found that a state may justifiably limit the entry of polygamous families to preserve "the Christian based monogamous culture" dominant in the United Kingdom. As such, the immigration restrictions were found to be justifiable under the *European Convention on Human Rights*.[84] Similar challenges have been brought against polygamy restrictions within immigration policies in **the Netherlands**. These challenges were also rejected on the basis of public order and the state's justifiable interest in forming an immigration policy that best promoted its economic interests.[85]

Immigration authorities in **Canada** have allowed entry to children born to polygamous men who subsequently relocated to Canada.[86] Applications made by spouses, however, are customarily rejected on the basis of the non-recognition of polygamy under Canadian law.[87] This is now specified within Canada's *Immigration and Refugee Protection Regulations*, which curb the ability to sponsor foreign nationals when sponsors and/or the prospective immigrants are married polygamously.[88]

Conclusions: Legislative and Policy Approaches to Polygamy Worldwide

The foregoing discussion reveals a diversity of legislative and policy responses to polygamy adopted in various jurisdictions throughout the world. Most countries whose laws are premised on secular, civil law do not recognize polygamous marriages formed domestically. Domestic polygamy may, however, be accepted in jurisdictions whose laws are founded on religious norms, or that allow persons to marry under religious or customary law. In regard to polygamous unions formed abroad, it is seen that, as a general rule, states have been willing to give effect to polygamous marriages formed by persons domiciled outside of the country, and according to the laws of the place where the marriage was celebrated. More conservative approaches, however, have been adopted in the context of dealing with immigration by polygamous families.

In view of this, the question that now arises is whether any of these approaches effectively responds to the social, economic and health realities that women in polygamy might experience, as described in the first section of this report. In addition, it remains relevant to consider whether and to what extent these approaches may be appropriate in the Canadian context. These questions form the focus of the final part of this discussion.

PART III - CONCLUSIONS AND RECOMMENDATIONS

As discussed throughout Part I, women's experiences in polygamy are extremely varied. Whether a woman, and often her children, thrives or suffers within a plural marriage often depend, on the socio-cultural context in which her marriage is situated, as well as the relationships that exist within her family unit. This being the case, it would be contrived and inappropriate to imagine that a single policy response to polygamy would be effective in all plural marriage societies and families. Solving the dilemmas that women may experience in this family structure requires respect for diversity among women, and recognition of their equality to one another and to men. It is therefore recommended here that the most appropriate response to polygamy is one that is multi-tiered, and adopts strategies at the legal and social levels, in both the private and public domains.

Part II discussed a variety of law and policy approaches that have been adopted the world over for addressing polygamy. It is submitted that none of these approaches, including the Canadian approach, can satisfactorily address the needs, interests and rights of women in polygamy. In particular, global responses appear to be premised on the presumption that polygamy is either universally harmful or benign to women, without any real analytical justification. However, it is submitted that legal and policy approaches must target factors detrimental to women (such as abuse, poverty, coercion and nefarious health consequences), rather than just the practice of polygamy on its own.

Nevertheless, despite the shortcomings of international policy efforts in regard to polygamy, the analysis remains instructive. In particular, this investigation illuminates strategies that might be effective in the Canadian context, as well as those that have been detrimental to women and thus should be avoided in our own policy development.

Reflections on Domestic Polygamous Practices

A number of countries recognize polygamous marriages on the basis of religious or customary law. In each case, a man's right to take additional wives is not absolute, but subject to specific requirements like obtaining judicial approval, ensuring equal treatment of all wives or obtaining consent from a spouse. The difficulty, however, is that while these conditions aim to protect women, the literature is replete with discussion indicating that women suffer socially, economically and even physically in these scenarios.

Moreover, it is difficult to assert that women in communities espousing polygamy as a core value always have a veritable "choice" regarding their marital structure. This is the case where the state allows polygamous marriages under its general rules (as in countries where family relationships are governed by Islamic law), and where the state recognizes polygamous marriages for those married under a legal system that allows this practice (as in South Africa and India). Although in the latter situation it is arguable that women have a choice not to marry within such a legal system, exercising such choice could require women to abandon their cultures and communities, an option that would clearly be unappealing and daunting for any woman in the world. As noted by Kaganas and Murray above, women in the most oppressive cultural circumstances are frequently "the least able to resist the demands of tradition" (Kaganas and Murray 1991: 133).

For these reasons, steps must be taken to ensure that our formal definition of marriage remains consonant with equality principles. Canada is urged not to consider moving to an approach that allows marriage and family relationships to be governed exclusively by religious or cultural norms. Before this is even contemplated, much more work needs to be done to examine the effects of such a move for women and children. In particular, thought must be given to the consequences of making marriage and family relationships a private matter governed by religious or cultural authorities. Such a development, while perhaps laudable for its recognition of legal pluralism and religious freedom, presents a risk for women and their children. Even if the state continues to oversee this area, its ability to ensure and enforce gender equality will be extremely limited if the regulation of marriage and the family is abdicated to religious or cultural leaders.

Law and policy approaches that prohibit polygamy might, at first blush, appear to further women's equality interests since monogamy alleviates the difficulties associated with marital structures premised on men alone having the ability to take plural spouses. Yet more thought must be given to the criminalization of polygamy and bigamy. The offence of bigamy relates to the act of carrying out a subsequent marriage. It thus suggests that a special premium is placed on monogamous marriage as an institution. The protection of this institution was viewed as a basis for retaining the offence of bigamy in the *Criminal Code* according to the Law Reform Commission two decades ago (Law Reform Commission of Canada 1985). Here again, however, further inquiry is required. Specifically, we must question whether marriage deserves such special treatment given that many in Canadian society opt not to marry. Moreover, spousal rights and obligations often extend to non-marital conjugal relationships, indicating the law's recognition of a growing social interest in spouse-like relationships aside from marriage. We thus might ask whether it makes sense to go as far as criminally prohibiting an act on the basis that it bears the potential to distort the institution of traditional marriage.

Moreover, the consequence of making an act an offence is that, if prosecuted and convicted, the person charged will be subject to a sanction, typically a fine or imprisonment. These two outcomes bear potentially dreadful consequences for women and children living in polygamous families. In plural marriage cultures, men are typically the primary income earners while women mainly work domestically. Therefore, when a polygamous husband is heavily fined or imprisoned, his wives and children clearly stand to suffer important economic hardship. Moreover, the offences of polygamy and bigamy are worded such that both husbands and wives can be convicted. Thus, if both parents are subject to penal sanction, the brunt of this clearly will be felt by children, who will face separation from them and possible placement in state care.[89]

Reflections on Foreign Polygamous Practices

Plural marriages formed in jurisdictions where polygamy is permitted require a different approach. Persons who enter polygamous marriages in these circumstances usually bear legitimate expectations of forming valid spousal relationships that create enforceable rights and obligations. Thus, as discussed, most jurisdictions — even those that prohibit domestic polygamy — are willing to protect the rights of parties in such marriages.

Difficulties in this area arise, however, in circumstances where a man and woman marry in Canada, but the husband then leaves the country and marries a second wife (without divorcing the first) in a jurisdiction that allows plural marriage. In this scenario, both wives have legitimate expectations in regard to their marriage and its effects, but these expectations conflict. With respect to the first wife, if the matrimonial effects of the husband's second marriage are recognized, this will diminish "the pie" of resources that he has to support his first family. With respect to the second wife, as seen in the discussion regarding polygamy in the immigration context, she will have difficulty obtaining entry into Canada on the basis of her polygamous marriage. If she obtains entry, she may claim matrimonial relief, but her share of her "husband's" assets will also be limited by his obligations to his first family.

This is a real conundrum that must be grappled with in the context of formulating policies in both the private and public law contexts. Thought must be given as to how to deter marriages by Canadian domiciliaries in foreign jurisdictions while already married in Canada. For the reasons discussed above, criminal law is probably not the most appropriate response. However, we might consider a more principled policy approach that examines and effectively responds to the interests of women and children who find themselves in situations like the one just described.

Recommendations for Future Policy Development in Canada Regarding Polygamy

Guiding Principles

Based on the reflections set out above, a series of recommendations is presented here for future action in developing policies for responding to polygamy. These recommendations have been formulated, and must be implemented, in the spirit of the following key principles.

- Policy responses to polygamy must be inspired by the objective of achieving *equality* and *full respect* for all persons. This is the primary objective that must guide all decisions. It must remain paramount and take precedence even over other important values, such as respect for religious freedom and legal pluralism.

  In this connection, it is noted that safeguarding women's rights will not necessarily eliminate all social injustices associated with polygamous marriages. As considered in this report, polygamous communities are commonly characterized not only by inequalities between men and women, but also by inequalities *among* men, particularly in regard to economic and social status. As such, policy measures must of course consider the rights of women and children as pre-eminent, given that their interests are commonly undermined by polygamous family life. At the same time, policy initiatives must not lose sight of the factors that impair justice for all individuals, and must design measures aimed at eliminating them.

- Proper responses to polygamy require a **keen awareness of cultural relativism**. Although measures must be sensitive to the different religious and cultural viewpoints that exist in regard to this issue, we must not be guided by an unquestioning acceptance and willingness to espouse these views. Rather, the various approaches that could be taken to polygamy must be critically assessed through the lens of gender equality and protection of the interests of children.[90]

- The most effective approach to polygamy will be a socio-legal one *that considers legal rules as they are in fact lived* by individuals. For example, considered in the abstract, polygamy might not seem objectionable since, strictly defined, it can be practised by men and women alike. Yet, in reality, plural marriages are most often assumed by men. Policy responses that fail to consider this and other practical realities of polygamy are dangerous, as they risk diluting the process to the level of abstract legal rhetoric, and making changes that hurt women rather than help them.

- There must be *respect for diversity among women*. As discussed throughout this report, women's experiences in polygamy are not homogenous, but largely shaped by their social and cultural contexts. Recognition of this diversity must be at the forefront of policy development, to ensure that no woman is left out of the reform process because she does not fit a particular model of a woman in polygamy (Kaganas and Murray 1991: 134).

- Law and policy approaches to polygamy must be guided by the goal of *facilitating meaningful choices for women* so they can avoid and leave circumstances in which they do not wish to be.

- Policy approaches should be aimed at *keeping families together* wherever this presents a clear benefit to all family members, especially mothers and children. As witnessed by experiences endured by immigrant women and children in France after the passing of the Loi Pasqua, coerced physical and legal separation of polygamous families can trigger devastating social and economic experiences. Thus, whether in the context of family law, criminal law or immigration law, a pre-eminent objective of polygamy policies should be to ensure that women and their children can remain together, and that they receive adequate support (private or public) to ensure their security.

Recommendations

In view of the foregoing guiding principles, the following recommendations are made.

1. The Parliament of Canada, in particular, the federal Department of Justice, must revisit the criminalization of bigamy and polygamy. These offences are rarely prosecuted and, as discussed, might not be consistent with current social perceptions of marriage. Moreover, the penal consequences that ensue from these offences might place women and children at considerable risk. As such, further study should be undertaken to determine the propriety of maintaining these offences in the *Criminal Code*.

2. Where allegations of physical, emotional and sexual abuse have been made within a community, these must be investigated and, where appropriate, relevant charges should be brought and prosecuted by the Crown. This remains the case in the context of communities practising polygamy. If sufficient evidence of abuse and/or assault exists, these can be prosecuted under Canadian criminal law without reference to the bigamy and polygamy provisions.

3. Given the risks created when families and communities submerge completely into the private realm shielded from state oversight, legislatures must not abdicate their responsibility over family relationships to community and religious authorities. For example, schools must not be shielded from outside monitoring and administration. It is insufficient simply to fund schools and allow their operation to be determined and controlled by religious or community members alone, without other state involvement.

   In addition, while communities and families must enjoy freedom from unnecessary and inappropriate state scrutiny and intrusion, complete insularity might also be problematic. The state must retain contact with communities and families at appropriate junctures, such as through schools, hospitals and law enforcement institutions. These points of connection should provide a space where individuals feeling oppressed or harmed by their families or communities can obtain proper support and relief. As such, work must be undertaken in Canada through provincial ministries overseeing health, social services, education, families, women and children to determine the most appropriate and effective points of contact with community members. These points of contact should be used as places where information can be disseminated and questions can be answered in an accessible and confidential manner.

4. Legal principles must be clarified to ensure that the rights and responsibilities of persons in polygamous marriages in Canada are adequately preserved. Provisions in the *Civil Code of Quebec* and the Ontario *Family Law Act* that would grant relief to parties who married polygamously in good faith are strongly endorsed, as these protect the legitimate interests and expectations of parties who would otherwise be extremely vulnerable.

   In the private international law context, the situations created when a married Canadian domiciliary marries subsequently in a jurisdiction that allows polygamy must be better understood. Although recognition of the subsequent marriage would run counter to current Canadian law, thought must be given to the predicaments of women and children in these circumstances. In particular, additional study is needed to consider what the most equitable approach would be to ensuring the protection of women who seek immigration to Canada as "subsequent" wives of polygamists, while at the same time taking care to ensure that the rights and interests of a man's first and "legal" family in Canada are not unduly compromised. This requires the involvement of federal immigration and federal and provincial justice officials.

5. To be positioned to make meaningful choices about whether to enter a polygamous marriage and whether to remain part of it, women must be empowered through information as to their rights and options. Particularly where polygamous marriages might be formed under religious norms within insular communities, outreach strategies are necessary to inform women about their legal status under a religious marriage that is not civilly recognized. Information must also be disseminated in regard to the potential psychological and reproductive health issues that women in polygamy could face. All of this information should be provided free of judgment about plural marriage, and should be neutral in tone and content, with the sole objective of providing accurate and meaningful information to women.

In addition, these outreach measures should strive to inform women who might already be in polygamous unions about resources available to them should they decide to leave their marriages and/or communities. Here again, this information should not be delivered with the objective of encouraging women to flee polygamous life, but instead, should be directed at providing neutral and instructive information for women who might contemplate leaving, but fear doing so for a variety of reasons.

Aside from informational services, women leaving polygamous communities and families may be in need of residential shelter for themselves and their children. These individuals might also need counselling from professionals having an awareness of the spiritual and psychological environment that they have left.[91]

Implementing these strategies will be challenging due to various factors, particularly the resources they require, and the fact that polygamy is often clandestinely practised in Canada. Even in Bountiful, where polygamy is openly practised, access to women might be hindered by the insularity of the community. Further thought must be given to determine the most effective ways to establish and sustain contact with women in polygamy. The engaged involvement of women having a present or past membership in polygamous communities will be indispensable to establishing and implementing effective measures in this regard.

6. Finally, as this report indicates, the issues to which polygamy gives rise are abundant, complex and multi-faceted. Thus, before any legislative reform takes place, it is urged that additional research be conducted that incorporates, as a key part of its methodology, direct communication with women in polygamy. As noted at the outset, it was not possible to undertake such research for the purposes of this report. Nevertheless, the involvement of women in polygamy would benefit future research enormously, as this will enhance secular understandings of women's experiences in this setting, and will help ensure that law and policy strategies will be helpful and meaningful to the women who will be directly impacted by such measures.

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ENDNOTES

[1] In the interests of specificity, it should be noted that the practice of one male marrying multiple wives is referred to as "polygyny" whereas one woman with plural husbands is known as "polyandry."

[2] Bala, for example, writes: "[I]t is revealing that all of the reports in North America of such [polygamous] relationships involve a man who has more than one wife (polygyny), and that none involve a woman with more than one husband (polyandry." (Bala 2003: 86; Bourdelois 1993: 3-4).

[3] This was found to be the case, for example, in Russia, where wives married polygamously under Islamic law were unprotected by state legal norms (BBC 1999).

[4] As discussed above, research in regard to the experience of immigrant women in polygamous marriages in France also suggests that conflicts between co-wives might rise to the level of physical and psychological violence (Bissuel 2002; Simons 1996).

[5] In this regard, Starr and Brilmayer's (2003) work is instructive. In their study on African women in plural marriages living in France, the researchers describe the marginalization and isolation these women experienced as a result of the hostility and repugnance with which mainstream French society viewed polygamy. While a direct analogy with the women of Bountiful is tenuous, particularly since the latter are not part of an immigrant community, the French and Canadian situations remain comparable given that they are both states governed by secular law, and in which polygamy is prohibited and generally not socially accepted.

[6] This is not the sole polygamous community described as depriving young women of choice regarding marriage. Starr and Brilmayer's (2003: 246) work, is also noteworthy on this point.

[7] But as discussed below, some women in Bountiful reject the contention that they are deprived of a choice regarding whether and whom to marry, and deny that their marriages are coerced or pre-arranged (D'Amour 2004b).

[8] Palmer's discussion of her childhood recollections suggests that members of Bountiful were taught not to trust "gentiles" from outside of the community. The disdain for the secular world is evident in her story (Palmer and Perrin 2004). This dynamic is also discussed throughout the report of the Committee on Polygamous Issues (1993).

[9] On this point, see also the comments made by Debbie Palmer in a recent media interview (CTV 2005a). The personal histories of six women who have left the Bountiful community, which are reproduced in the report of the Committee on Polygamous Issues, are also illuminating (Committee on Polygamous Issues 1993: 78ff).

[10] See, for example, BBC (2001), which indicates that the practice of allowing polygamy under Islamic law is the principal cause of divorce in the Kingdom of Saudi Arabia.

[11] See also BBC (2000).

[12] "Repudiation" is the term that refers to the practice under Islamic law that allows men to divorce women unilaterally without cause and without the wife's consent or presence (M'Sahla 2001: 178ff; Mir-Hosseini 2003: 7).

[13] See also "Dr. Phil" (2005).

[14] See also CTV (2005a).

[15] In addition to Strassmann's work, note also Simons' article indicating that children of polygamous immigrant women in France often suffer violence at the hands of their mothers' co-wives (Simons 1996).

[16] See, in this respect, the discussion in Part II of this report, which describes jurisdictions that permit polygamy, yet subject to the requirement that a husband can financially support each of his wives and children adequately and equally.

[17] *Moge v. Moge* [1992]; Rogerson (1997); Sheppard (1995); Grassby (2004).

[18] See also BBC (2000).

[19] Polygamy was also indicated as a serious risk factor in the spread of HIV/AIDS in Nigeria by the Committee on the Elimination of Discrimination Against Women: See CEDAW, Nigeria (2003: 8).

[20] See also Human Rights Watch Zambia (2003).

[21] The requirements of polygamy in Algeria were also discussed by Sadou (2005). Sadou noted that while Algerian law requires a husband to treat his wives equally, this is an aberration from how polygamous marriages actually function.

[22] *Rr. Tien Supartinah binti R. Mankudirodo v. R. Koeswiradyo bin R. Wignyosucipto dan Rostini binti M. Soleh*, Jakarta Pusat No. 162 (1979) (Indon.) cited in Cammack *et al.* 1996: 65-66.

[23] CEDAW India (1999: para. 363). Also discussed by Nainar (2005).

[24] Nainar (2005) noted, however, that there is a movement among Islamic women for the reform and codification of Islamic personal law to ensure greater gender equality in this sphere. This has been strenuously opposed by conservative voices within the community.

[25] Pursuant to section 5(i) of the *Hindu Marriage Act, 1955*, persons to whom the Act applies may lawfully contract a marriage only if neither already has a surviving spouse. Under s.11 of this statute, marriages that take place in contravention of s. 5(i) are void.

[26] Under s. 17 of India's *Hindu Marriage Act* polygamous marriages are subject to prosecution under ss. 494 and 495 of the Indian *Penal Code, 1860*. As noted by the court in *Lily Thomas v. Union of India & Ors and Other Appeals*, [2000] 2 LRI 623 (Lexis) at para. 24, s.17 of the

Hindu Marriage Act corresponds to ss. 4 and 5 of the Indian *Parsi Marriage & Divorce Act*. As such, polygamy also is not recognized under Parsi personal law in India.

[27] CEDAW India (1999: paras. 373-74); *Lily Thomas, supra* note 26.

[28] Philippines, *Code of Muslim Personal Law*, art. 180; *Revised Penal Code*, art. 349.

[29] Philippines, *Code of Muslim Personal Law*, arts. 27, 53(e), 162.

[30] Singapore, *Administration of Muslim Law Act*, ss. 49(f)(vi), 96(2).

[31] The distinction between "polygamy" and "bigamy" is not always clear and the terms are often unfortunately intermingled in the literature. In this report, "bigamy" refers to the *act* of marriage by someone already married or to someone known to be married, whereas "polygamy" refers to the *status* or *situation* of having more than one spouse simultaneously (Chapman 2001: 11).

[32] See the UK *Matrimonial Causes Act, 1973,* ss. 11(b), (d) which state that a marriage is void where, at the time of celebration either party was already lawfully married. Section 11(d) extends this provision to marriages outside of the United Kingdom, where the parties were domiciled in the United Kingdom. Plural marriage is also criminalized in the United Kingdom, pursuant to s. 57 of the *Offences against the Person Act, 1861*. The offence is a felony, punishable by a maximum of seven years imprisonment.

[33] See CEDAW Samoa (2003: 23, 91).

[34] In Trinidad and Tobago, polygamy is not recognized, even under the *Muslim Marriage Act*. Bigamy is considered a criminal offence punishable by imprisonment under the *Offences against the Person Act* (CEDAW Trinidad and Tobago 2001: 135).

[35] Although Islam is recognized as Tunisia's state religion, polygamy was abolished by the Tunisian *Code of Civil Status, 1956*, which criminally prohibits this practice (Afary 2004; Dangor 2001: 116; Rude-Antoine 1991: 96; Venkatraman 1995: 1980-82; Meziou 1996: 213). Persons who knowingly enter into a polygamous marriage face potential penal sanctions of imprisonment and/or fines.

[36] In France, polygamous marriages are considered to be void as against public order. (Bourdelois 1993: 180ff), and are prohibited under the French *Civil Code* (art. 147) and the *Code Pénal* (art. 433-20). Contravention could entail punishment by way of imprisonment for a year and a fine of €45,000.

[37] Polygamous marriages are void under Australian law and criminally prohibited. See Australia, *Marriage Act, 1961* 1961/12 as am., ss. 23 (1)(a), 23B(1)(a) and 94. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland*, where a subsequent polygamous union celebrated in Australia was refused recognition.

[38] Polygamous marriages by persons domiciled in New Zealand are both void and criminalized. See ss. 2 and 31(1)(a)(i) of the *Family Proceedings Act 1980*; *Quilter v. Attorney-General* (1997), (1998), and ss. 205-207 of the *Crimes Act, 1961*.

[39] The criminal law of Hong Kong deems bigamy to be a criminal offence carrying a possible sanction of imprisonment. *HLHK Criminal Law and Procedure 286* (February 15, 2004) (Lexis). Under family law legislation, a married man's concubine might, however, have spousal rights and privileges if accepted by the husband's family. *HLHK Family Law 2* (February 15, 2004) (Lexis).

[40] Marriage and family relations are governed by the *Marriage Law of the People's Republic of China*. Under article 2, marriage is monogamous. Article 3 provides that bigamy and cohabitation with a married person are prohibited. Bigamy by a spouse renders a marriage invalid (article 10(1)), but this may not prejudice the matrimonial property interests of the parties to the lawful marriage (article 12). Bigamy is cause for divorce (art. 32(1)) and the aggrieved party can seek damage compensation under article 46. Bigamy may also be viewed as a criminal act (art. 45).

[41] This is pursuant to art. 340 the *Criminal Code* of Madagascar. See also CEDAW Madagascar (November: 33).

[42] See CEDAW Paraguay (2004: 7).

[43] Polygamy is prohibited under the *Marriage and Family Code*. See Georgia, Initial Report of States Parties to CEDAW (10 March 1998) at 10, 24.

[44] Pursuant to Kazakhstan's *Marriage and Family Code*, polygamous marriages are not recognized. The country's 1998 *Criminal Code* did not, however, recognize polygamy as an offence, even though this had been the case under the prior Code. See CEDAW Kazakhstan (2000: 69).

[45] CEDAW Thailand (1997: 66). Despite the legal prohibition, Bao indicates that polygamy continues to be practised in Thailand, through ceremonial — but unregistered — marriages (Bao 2005: 80-81).

[46] In Viet Nam, the *Marriage and Family Law, 2000* identifies monogamy and spousal equality as among the fundamental principles of marriage and family relations, and declares polygamy to be illegal (Wisensale 1999: 604). See also CEDAW Viet Nam (2000: 44).

[47] Although Armenia does not recognize plural marriages, polygamy is not sanctioned by the country's *Criminal Code*, since it is not viewed as a current problem in that country (CEDAW Armenia 1999: 27).

[48] The adoption of the secular *Civil Code* in Turkey in 1926 replaced Islamic law, and prohibited polygamous marriage. The Code further allows a court to declare a second marriage concluded in violation of this prohibition invalid (Welchman 2000: 185; Dangor 2001: 116). Nevertheless,

at least one report indicates that polygamy continues to be practised in this jurisdiction. See DW-World (2005).

[49] Nepal's *Country Code* states, "No male shall, except in the following circumstances, marry another female or keep a woman as an additional wife during the lifetime of his wife or where the conjugal relation with his first wife has not been dissolved under the law: [i] If his wife has any contagious venereal disease and has become incurable; [ii] If his wife has become incurably insane; [iii] If no child has been born or remained alive within ten years of the marriage; [iv] If his wife has become lame and unable to walk; [v] If his wife has become blind of both eyes; [vi] If his wife has lived separately after obtaining her partition share under No. 10 or No. 10A of the Chapter on Partition." Muluki Ain 2020 [*Country Code* 1963] cited in Human Rights Watch Nepal (2003).

[50] While the leader of the northern Russian area of Ingushetia declared polygamy legal (Dubnov 1999), this decree was shortly dismissed as unconstitutional by the Russian Justice Minister. See BBC (1999).

[51] *Reynolds v. United States* (1878); Whitehead 1997: 34-38. See also the recent case of *Bronson, Cook and Cook v. Swensen* (2005).

[52] See *R. v. Moore* [2001]; *R v. Moustafa* [1991]; and *R. v. Sauvé* [1997]. However, in a somewhat older case, a husband convicted of bigamy was sentenced to two years, six months imprisonment. See *R. v. Young* [1965].

[53] See *Moore*, ibid.

[54] Bill C-38, recently introduced in the House of Commons, defines civil marriage in s. 2 as "the lawful union of two persons to the exclusion of all others." Thus, while the Bill would allow for recognition of same-sex marriages, the wording ensures that only monogamous marriages – whether homosexual or heterosexual – will be recognized.

[55] This is clarified under the definition of "spouse" within s. 1 of Ontario's *Family Law Act* (F.L.A.), as well as within articles 380-390 of the *Quebec Civil Code*. See also *G.P. v. B.M.* (2002). In Ontario, although a polygamous party in bad faith is not a "spouse" within the general definition of this term in s. 1 F.L.A., a court might still be willing to find a way to extend matrimonial relief to such persons. See *Reaney v. Reaney* [1990]. In addition, spouses in bad faith might be entitled to spousal support, given that the definition of spouse for the purposes of support (found in s. 29 F.L.A.) is broader than the general definition in s. 1 F.L.A.

[56] See CEDAW Eritrea (2004: 53ff).

[57] See CEDAW Nigeria (1997: 62ff; 2003: 8, 54-55).

[58] See also CEDAW Kenya (2000: 38-39).

[59] See also CEDAW Uganda (2000: 66); Human Rights Watch Uganda (2003).

[60] See CEDAW Zambia (1999: 64).

[61] See CEDAW Namibia (1997: 170-172).

[62] See CEDAW Guinea (2001: 114-115, 121-123).

[63] See also CEDAW Zimbabwe (1996: 59).

[64] Also discussed by Manjoo (2005).

[65] Manjoo (2005), however, has discussed the shortcomings of this bill, indicating that it satisfies no group within South Africa.

[66] As in South Africa, for example, where customary marriages must be registered under s. 4 of the *Recognition of Customary Marriages Act, 1998*.

[67] Although the discussion in this section refers to "English" law primarily, it should be noted that generally, the law throughout the United Kingdom in this area is uniform. For reference to Scottish legal principles in this area see Shah (2003: note 1); Esplugues (1984: 309-10).

[68] *Hyde v. Hyde* [1866]; *In re Bethell* [1887].

[69] A "potentially" polygamous marriage is understood as one formed in a jurisdiction where polygamy is recognized, but that has not actually become polygamous (i.e., there are still only two spouses).

[70] Section 47 of the *Matrimonial Causes Act, 1973* grants matrimonial relief to parties in a polygamous marriage validly formed outside the United Kingdom.

[71] As noted earlier, ss. 11(b) and (d) of the *Matrimonial Causes Act, 1973* prohibits persons domiciled in the United Kingdom from marrying polygamously, whether in England or abroad.

[72] *Private International Law (Miscellaneous Provisions) Act 1995*, ss. 5 and 7 (section 7 extends this law to Scotland). This provision was enacted in response to *Hussain v. Hussain* [1982], a case in which an English domiciliary claimed that his marriage was unlawful under s. 11(d) of the *Matrimonial Causes Act 1973*. Although the marriage was in fact monogamous, the husband argued that it should not be recognized since, having been celebrated in a jurisdiction that recognized polygamy, it was potentially polygamous. While the English Court of Appeal rejected his argument, its reasoning was considered dissatisfactory by commentators and law commissioners. Legislation was thus enacted to clarify the treatment of de facto monogamous marriages formed in jurisdictions where plural marriage is accepted (Shah 2003: 377ff; Briggs 1983; Pearl 1983; Chapman 2001: 14, 45-46).

[73] Aside from the right to matrimonial relief recognized under s. 47 of the *Matrimonial Causes Act, 1973*, other U.K. legislation includes specific provisions explicitly recognizing validly formed polygamous marriages (Chapman 2001: 45-50; Martin 1994: 425). See e.g., *State*

Pension Credit Act 2001; *State Pension Credit Regulations 2002*; *Social Security (Loss of Benefit) Regulations 2001*, ss. 3A, 10(1)(a), 11(2)(b) and (e); *Child Benefit (General) Regulations 2003*, s. 35; *Child Support, Pensions and Social Security Act 2000*, s. 10C; *Social Security (Breach of Community Order) Regulations 2001*, s. 6.

[74] *Family Law Act 1975*, s. 6; *Marriage Act 1961*, s. 88C(1)(a).

[75] *Marriage Act 1961*, s. 88D(2)(a).

[76] *Family Proceedings Act 1980* (N.Z.), 1980/94, ss. 2 and 31(1)(a)(i). See also *Quilter v. Attorney-General* (1997), (1998).

[77] *Supra*, note 36.

[78] Article 3, *Code Civil Français*.

[79] See e.g., *Lim v. Lim* (1948).

[80] *Kaur v. Ginder, Ginder v. Kor* (1958); *Sara v. Sara* (1962) (varied in part on appeal in a judgment that recognized the polygamous marriage); *Re Quon* (1969); and *Hassan v. Hassan* (1975). In these judgments, courts adopted the doctrine of "conversion" which had been developed in English common law, to conclude that potentially polygamous marriages formed abroad had become monogamous once the parties relocated to Canada.

[81] Ontario, *Family Law Act*, s.1(2); Ontario, *Succession Law Reform Act*, s. 1(2).

[82] *Civil Code of Quebec*, arts. 3088, para. 1 and 3083.

[83] *Civil Code of Quebec*, art. 3081.

[84] *R.B. v. United Kingdom* (1992).

[85] See *M & O.M. v. The Netherlands* (1986); *E.A. & A.A. v. The Netherlands* (1989).

[86] *Re Immigration Act and Bains* (1954); *Tse v. Minister of Employment and Immigration* [1983]; and *L.J. c. Ministre des relations avec les citoyens et de l'immigration* (2002) [*L.J.*].

[87] *Ali v. Canada*, [1998]; *Awwad v. Canada (Minister of Citizenship and Immigration)*, [1999]. See also *L.J., ibid.*, where interestingly two of a husband's wives were previously allowed entry into Canada as refugees, but an application for sponsoring a third wife was refused on the premise of the polygamous nature of the parties' marriage.

[88] Canada, *Immigration and Refugee Protection Regulations* S.O.R./2000-227, s.117(9)(c).

[89] The potential nefarious consequences of criminally prosecuting family members for polygamous practices are revealed throughout Solomon's (2003) account of her childhood in an American Fundamentalist Mormon community.

[90] This understanding of the difference between cultural relativism and cultural sensitivity is based on the astute observations communicated by Professor Bakht (2005).

[91] Similar recommendations were advanced by the Committee on Polygamous Issues (1993: 109-110), based on its assessment of polygamy in Bountiful.

An International Review of Polygamy: Legal and Policy Implications for Canada

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ABSTRACT

Status of Women Canada contracted the Canadian Research Institute for Law and the Family to conduct an international review of polygamy, examining the social, legal and policy implications for Canada. This paper sets the present controversy in Canada in a broader international context, by discussing social science literature and legal developments in other countries, and relating this international material to the situation in our country. The paper reviews the social science literature and media reports about the effects of polygamy on women and children in Canada and other countries. Legal issues that have arisen in other countries related to polygamy are summarized, with a particular focus on countries that have legal systems most similar to our own. The current legal and policy issues concerning polygamy in Canada are also discussed. The paper concludes by considering how the information and developments of other countries shed light on the current controversies in Canada, offering legal analysis and policy recommendations for this country.

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EXECUTIVE SUMMARY

There has been growing concern and controversy about polygamy both in Canada and around the world. In many countries where polygamy has traditionally been practised, there has been increasing advocacy for the abolition or limitation of polygamy to protect women from abuse and promote gender equality. A number of Western countries face a different issue as growing immigrant populations from Asia and Africa have brought with them their attitudes and practices concerning family life, including polygamy. In the United States, there is increasing concern about the practice of polygamy and other abuses of women and children in Fundamentalist Mormon communities in a number of Western states. In Canada, there is concern about the practice of polygamy by Fundamentalist Mormons in the area of Bountiful, British Columbia, and questions have arisen about the constitutional validity of Canada's laws prohibiting polygamy.

Status of Women Canada contracted the Canadian Research Institute for Law and the Family to conduct an international review of polygamy, examining the social, legal and policy implications for Canada. This paper is one of four prepared under contract with Status of Women Canada to help inform politicians, practitioners and the public, and to help shape public policy. The paper seeks to set the present controversy in Canada in a broader international context, discussing social science literature and legal developments in other countries, and relating this international material to the situation in our country.

Summary of Concerns and Recommendations

A fundamental consideration in determining Canada's approach to polygamous marriages should be the social, psychological and economic impact this practice has on women and children. Both internationally and in Canada, social science research and media reports suggest that polygamy is often exploitive of women. The practice of polygamy is also contrary to notions of gender equality that are fundamental to Canadian society. Evidence also suggests that polygamy has significant negative effects on children, as children of polygamous families are more likely to experience emotional difficulties and have lower educational achievement than children in monogamous families. Questions have also been raised about high levels of child abuse, neglect and exploitation in polygamous families. In Fundamentalist Mormon communities in North America, a significant number of reports indicate that adolescent girls and young women are being coerced, physically but more commonly psychologically, into polygamy. Adolescent boys and young adult males are also harmed by polygamy, in particular if they are expelled from their communities and families as adolescents so they do not compete with older male community members for brides. As well, polygamy is associated with economic costs to society, as many polygamous families are unable to support their many children.

In 1985, the Law Reform Commission of Canada proposed that the polygamy provisions of the *Criminal Code* should be repealed, as the Commission concluded that polygamy is "a marginal practice which corresponds to no meaningful legal or sociological reality in Canada." Since then, however, there has been a much greater awareness of the number of individuals living in polygamous families in Canada, as well as an apparent increase in their numbers through both immigration and the high birth rate associated with polygamy. Further, much of the research about polygamy and its negative effects on women and children has only been published in the last two decades. Since 1985, Canada has provided significant social and legal recognition to monogamous relationships outside the traditional definition of marriage (i.e., common-law couples and same-sex families). Decriminalizing polygamy would be a very significant change from the present law, as the participants in such unions would no longer be living in a relationship that is legally prohibited and they would likely be eligible for an extended recognition as "spouses" for a range of legal purposes.

At the international level, over the last century, there has been a movement toward the elimination of polygamy, based on concerns about the gender inequality inherent in polygamy and its harmful effects on women and children. In light of this international trend, if Canada were to decriminalize and legally recognize polygamous unions, it might be taken as a signal that Canada is unconcerned with gender equality and child welfare, since polygamy has been linked with negative effects for both women and children. The *Criminal Code* s. 293 prohibits polygamous marriages or cohabitation in a polygamous union. If polygamy is inherently exploitive of women and damaging for their children, as the research suggests, then its practice needs to be prohibited. While the existence of *Criminal Code* s. 293 does not mean that all those in polygamous unions belong in prison, we recommend that this provision should remain as an integral part of Canada's policy of discouraging polygamous marriages. Although not enforced by criminal prosecutions, the *Criminal Code* s. 293 plays an important symbolic and educational role, proclaiming Canada's disapproval of this type of relationship. While the question of constitutional validity of the prohibition against polygamy can only be decided by the courts, in our view s. 293 is likely valid as it promotes gender equality and protects women and children.

Although the elimination of polygamous unions in Canada is desirable, such relationships should be discouraged in a manner that is sensitive to the positions and needs of those vulnerable individuals who have been pressured to enter polygamous unions, and to the needs of the children who are born of such unions. The indiscriminate arrest of any adult living in a polygamous union is not desirable, particularly if the result is that children would be taken from both of their parents. While prosecutions under s. 293 should take place, they are appropriate only if there are complaints of women being coerced into these relationships. To limit the number of polygamous unions established in Canada, the Canadian government should continue its immigration policy of exclusion of those who practise polygamy. There should, however, continue to be limited legal rights for those who lived in polygamous unions to protect the vulnerable, for such purposes of inheritance and child support, including limited recognition of polygamous marriages entered into in jurisdictions where polygamy is a valid form of marriage.

These conclusions should be viewed as tentative. There is a need for further Canadian research on the effects of polygamous unions on women and children, including research into how many polygamous households have been established in Canada.

1. THE CONTEXT OF THE POLYGAMY CONTROVERSY IN CANADA

The Intent and Scope of This Study

There has been a growing concern and controversy about polygamy around the world. In many of the countries where polygamy has traditionally been practised, there has been increasing advocacy for the abolition or limitation of polygamy to protect women from abuse and promote gender equality; the practice of polygamy is profoundly patriarchal, and both reflects and reinforces gender inequality. A number of Western countries with a tradition of monogamy now face a different issue as growing immigrant populations from Asia and Africa have brought with them their attitudes and practices concerning family life, including polygamy. In the United States, there is increasing concern about the practice of polygamy and other abuses by the leaders of Fundamentalist Mormon groups in a number of Western states, though the practice of polygamy by this religious group has gone on for over 100 years.

In Canada, there has been growing concern and controversy about polygamy for a number of reasons that reflect developments in other countries, as well as some developments that are more uniquely Canadian. The most publicized concern is the practice of polygamy by Fundamentalist Mormons in the area of Bountiful, British Columbia. While this group has been practising polygamy in Canada for over 50 years, the issue has received attention only over the past decade and a half, with former members of the community raising concerns about both the practice of polygamy and abuse within the community. Uncertainty about the constitutional validity of Canada's laws prohibiting polygamy and concerns about how to enforce the law have made authorities in British Columbia reluctant to act. There have also been reports about some immigrant families, principally Muslims, practising polygamy in Canada, and questions have been raised about how polygamy should be taken into account in immigration policy. Further, with the debate about the redefinition of marriage to include same-sex partners has come the question of whether marriage should also be legally redefined in Canada to include polygamy. It has been argued that the inclusion of same-sex partners within marriage is, at least historically, without much precedent, but polygamy has a very long history and is still widely practised in many countries.

With the growing controversy and concern about polygamy, it is understandable that Status of Women Canada would want some research done on this issue to help inform politicians, practitioners and the public, and to help shape public policy. This paper is one of four prepared under contract with Status of Women Canada on issues related to polygamy. This paper seeks to set the present controversy in Canada in a broader international context, discussing social science literature and legal developments in other countries, and relating this international material to the situation in our country.

Section 1 provides an introduction and sets the context for this study of polygamy. Section 2 surveys social science literature and media reports about the effects of polygamy on women and children in Canada and other countries. Section 3 summarizes legal issues that have arisen in other countries related to polygamy, with a particular focus on countries that have legal systems most like Canada's. Section 4 discusses the current legal and policy issues concerning polygamy in Canada. Section 5 considers how the information and developments of other countries shed light on the current controversies in Canada, offering legal analysis and policy recommendations for this country.

It is important to mention the limitations of this study. There was only a very limited time to organize and carry out the research for this paper, and to complete the analysis and writing. There is a very large international literature on some aspects of polygamy, especially its historical origins and first-person accounts of its practitioners, and we did not review it all. Further, although we had some informal contacts with individuals both concerned with the practice of polygamy in Bountiful and supportive of it, as well as with some Canadian professionals who had experiences with polygamy, we did not do any systemic empirical research of our own. One main recommendation is the need for further research about the practice of polygamy in Canada and elsewhere, as there are great limitations to the existing literature and reporting on polygamy.

Polygamy in Context: History

There is a long social, religious and legal history of polygamy. Polygamy was practised by many figures in the Old Testament of the Bible, including Abraham, David and Solomon. The Koran also accepts the practice of polygamy, though it does not require it, as a way to provide care for widows and orphans. "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly, then only one" (4:3). The Koran also recognizes the challenges of living in a polygamous marriage. "You cannot be equitable in a polygamous relationship, no matter how hard you try" (4:129). In a primitive agrarian or hunting-based society with a high male death rate, especially due to war, and economic support only available to those who lived in a household, polygamy served useful social functions. Polygamy was widely practised, especially in Asia and Africa, but also among some of the Aboriginal peoples of North America.

Although polygamy was practised among some early Christians, and is still practised by some Christians, the early Christian Church rejected polygamy as inconsistent with the ideal of marriage as a love-based partnership of equals.

As is more fully discussed in Section 3, while polygamous marriages are legal in many countries, with the growing acceptance of the principle of gender equality, there has been a definite trend over the last century toward prohibiting polygamy. Societies that introduce laws to prohibit this practice, however, recognize the need to protect those who are vulnerable and, for example, prohibit polygamous marriage as of a particular date, but continue to give full marital status and rights to those who entered into a polygamous marriage prior to that date.

Polygamy in Canada: An Introduction

Until the recent debate over same-sex marriage, the accepted definition of marriage in Canada was based on the 1866 English case of *Hyde v. Hyde.*[1] "Marriage…may…be defined as the voluntary union…of one man and one woman to the exclusion of all others."

Individuals cannot enter into a valid polygamous marriage in Canada, and since 1892 it has been a criminal offence to enter into a polygamous marriage or reside in a polygamous union in Canada. There are only a couple of reported prosecutions for polygamy, however, and these occurred about a century ago, and involved Aboriginal peoples. In 1985, the Law Reform Commission of Canada proposed that the polygamy provisions of the *Criminal Code* should be repealed, as the Commission concluded that polygamy is "a marginal practice which corresponds to no meaningful legal or sociological reality in Canada" (LRC 1985: 23). Since then, however, there has been a much greater awareness of the number of individuals living in polygamous families in Canada, as well as an apparent increase in their numbers through both immigration and the high birth rate associated with polygamy. Further, much of the research about polygamy and its negative effects on women and children has only been published in the last two decades.

It is estimated that there are about 1,000 Fundamentalist Mormons living in polygamous unions in the area of Bountiful, British Columbia, and some neighbouring areas in Alberta. While there have been police investigations into polygamy and allegations of abuse in this community, there have been no prosecutions for polygamy, at least in part because of concerns about the constitutional validity of Canada's laws on polygamy. As discussed in Section 3, it is important to note that American laws on polygamy have consistently withstood constitutional challenge, though Canada's law has yet to withstand constitutional scrutiny in the courts.

In the 1980s, Muslim polygamous marriage emerged as a major issue in Western Europe. In Canada there has not been any documentation of Muslims practising polygamy. However, when this issue is raised in the media, vague reference has been made to a small number of Muslims practising polygamy in Canada, and our conversations with professionals confirm that there are polygamous Muslim families in Ontario. Muslim polygamous marriages have been documented as an issue in the context of immigration to Canada. Though a party to a polygamous marriage does not qualify as a "spouse" under the *Immigration and Refugee Protection Act, 2001*, there have been reports of cases in which Muslim and Fundamentalist Mormon parties to such unions have attempted to gain or have gained admission to Canada under other immigration categories.

Though the actual number of polygamous marriages in Canada is unknown, the reality is that they exist. To avoid placing hardship on those already in a vulnerable position — plural wives and their children — foreign polygamous marriages that were validly entered into are accorded limited legal recognition in Ontario. Under provincial law in Ontario, the definition of "spouse" for purposes of separation and succession law includes those in polygamous marriages, if the marriage is valid in the foreign jurisdiction in which it was celebrated. As well, a woman living in a polygamous union in Canada would very likely be able to make child support claims and seek the same property relief as ordinary common-law spouses using the doctrine of the constructive trust.

Social Science Questions: The Effects of Polygamy on Women and Children

A fundamental consideration in determining Canada's approach to polygamous marriages should be the social, psychological and physical impacts this practice has on women and children. Our review of the international social science literature addresses the following research questions.

- What are the social, economic, health and psychological effects on women living in polygamous relationships? What are the policy implications of this information for Canada?
- Do polygamous relationships promote inequality between women and men?
- What are the social, economic, health and psychological effects on children living in polygamous relationships? What are the policy implications of this information for Canada?

Three Major Legal Questions: Distinct but Linked

This paper addresses three major legal questions to inform the manner in which polygamous marriages are dealt with in Canada. The three questions relate to freedom of religion, multiculturalism and enforcement of the law.

The first question concerns the scope of the right to freedom of religion. While individuals are free to hold any religious beliefs, the question of whether Canada should tolerate the practices of religious minorities that conflict with mainstream beliefs and are associated with significant negative effects for women and children is contentious. One difficult issue associated with polygamy is the extent to which children born into these communities are indoctrinated with a belief in polygamy from birth rather than freely choosing to practise polygamy. In particular, Fundamentalist Mormon communities have been characterized as "cults" where children are raised within an extremely insular community that entirely shapes their perception of the world. This may deprive them of the opportunity to make fully informed decisions about their own lives. Should Canadians be willing to tolerate polygamy, the question of how it should be regulated will arise.

The second question is whether Canada, as a multicultural state, should recognize and regulate practices, like polygamy, that are acceptable by immigrant groups in their countries of origin but are contrary to traditional Canadian behaviour. This question has already arisen in other contexts. Arranged marriages, for example, are common in South Asian communities and that practice has been accepted in Canada, as long as the consent to marry is genuine. In contrast, the practice of female genital mutilation is not accepted, though it may still be occurring in Canada. There is a debate about whether Sharia family law arbitration, as well as polygamy, should be permitted. Like polygamy, Sharia family law arbitration is the subject of considerable contemporary debate.

The third question concerns how present Canadian laws prohibiting polygamy should be enforced. The laws on polygamy are intended to benefit women and children, and to prevent a practice that is associated with significant harms to them. However, the actual enforcement of these laws may have negative effects on those who are most vulnerable in polygamous unions — women and children. Issues of enforcement are complicated by the fact that women who enter polygamous unions, and their children, often do not see themselves as "victims," and resist state interference in their family lives.

2. REVIEW OF SOCIAL SCIENCE RESEARCH AND MEDIA REPORTS

The following review summarizes information available from social science research and media reports on polygamy in Canada and in other countries. The major focus is on the social, health, economic and psychological effects on women and children living in polygamous families. This review is undertaken to clarify legal and policy issues in regard to polygamy in Canada. While the international literature is informative, it must also be appreciated that the effects of polygamy on individuals are very much influenced by the broader social, cultural and economic context of the society in which they live. Further, those who live in polygamous families in North America are virtually all members of religious communities that have different values, practices and beliefs from the broader society in regard to marriage and many other issues.

Polygamy: The Nature and Extent of Polygamy

Polygamy is defined as "the practice of having more than one spouse at the same time" (Embry 1987: xvi). There are two basic forms of polygamy: *polyandry*, where one woman has more than one husband, and *polygyny*, where one man has more than one wife. Over the course of history and today, polygyny is by far the most common form of polygamy, though there have been some documented reports of the practice of polyandry in isolated societies (Al-Krenawi et al. 1997). This review focusses exclusively on polygyny, which appears to be the only type of polygamy practised in North America. Further, the term "polygamy" is often used to mean polygyny, and in this paper, unless otherwise indicated, we follow that common usage.

Polygyny is practised in about 850 societies in the world (Bergstrom 1994). It is most common in Middle Eastern and African nations, where demographic, economic, cultural and, predominantly, religious antecedents continue to encourage its practice (Elbedour et al. 2002). Specifically, cultural groups with a high incidence of polygamous marriage include Kuwaitis, Saudi Arabians, Bedouin Arabs, the Xhosa of South Africa, the Yononamo of Venezuela, Nigerians, Ghanians, the Kipogi and Datagal of East Africa, and the Yoruba of West Africa (Elbedour et al. 2000). There is also a history of the practice of polygamous marriage in South and East Asia, including China, India, Bangladesh and Pakistan.

In North America, polygamy is not widely practised, but there is a reasonably well documented history of polygamy. The incidence of polygamy is unknown, largely due to the legal prohibitions against plural marriage and the consequent secrecy. Estimates of the number of people living in polygamous families in North America range from 30,000 to 210,000 (Kopala 2005; Strassberg 2003). The current practice of polygamy in North America is most often associated with Fundamentalist Mormon groups, whose practice is based on their religious beliefs (Embry 1987; Altman and Ginat 1996). Most are Fundamentalist Mormons (with the largest group being the Fundamentalist Church of Jesus Christ of Latter Day Saints), primarily living in relatively isolated areas in Arizona, Texas and Utah, with some living in British Columbia and Alberta. In addition, polygamy is practised by Muslim families in North America. Though the number of these families is unknown (Hassouneh-Phillips 2001), it does not appear to be large. Further, there are also Christian, Jewish and non-denominational polygamous families scattered across North America. While there was a history of polygamy among some Aboriginal peoples, the practice seems to have died out among them.

North America

In Fundamentalist Mormon communities, marriages are generally arranged by religious leaders based on the belief that it is a way by which God, speaking through these leaders (often called "prophets"), can act directly in the lives of the people. Because polygamous marriages are not legally recognized in North America, the common practice is for a man to legally marry his first wife, and thereafter have religious ceremonies to establish "celestial marriages." Participation in polygamous marriages is considered a fundamental part of the religious practice of Fundamentalist Mormons. For women, entrance to the highest levels of heaven is believed to be dependent on obedient participation in an assigned plural marriage and the bearing of as many children as possible (Committee on Polygamous Issues 1993; Embry 1987). If a man displeases religious leaders, he may be excommunicated from the Church, and in some Fundamentalist Mormon communities, his wives may be "reassigned" to another male member of the faith in good standing.

Those in polygamous unions value love-based relationships between husbands and wives, but concurrently multiple dyadic (husband and wife) relationships must coexist in the same family unit (Altman and Ginat 1996). There is the potential for competition and rivalry between wives, with some wives and their children favoured over others. Relationships between wives must be managed if familial harmony is to be maintained. Fundamentalist Mormon family structure is highly patriarchal, with the husband being viewed as the head of the household, and the one who will determine his wife's entry into heaven. As identified by Peters (1994) and Altman and Ginat (1996), since these communities practise polygamy in violation of existing cultural, social and legal norms, there is often a great deal of secrecy and isolation to preserve their collective beliefs and practices. They also tend to be isolated geographically, and it is difficult for researchers, police or child protection workers to gain meaningful access to these communities.

Fundamentalist Mormons typically differ from the wider society not only in terms of the practice of polygamy, but also in beliefs and practices of religious observance, deference to religious authority, dress, gender roles, recreation and social activities. Members of these communities reject the values and culture of the wider society in regard to marriage and gender equality. According to Altman and Ginat (1996), membership in a Fundamentalist Mormon community subjects individuals to many pressures, both internally (family, community) and externally (culture, society). It is impossible to separate the effects of polygamy on women and children from the effect of living in a socially isolated community, with very strict expectations for its members that differ radically from those of the broader society.

Canada -- Fundamentalist Mormons

Background: Media Coverage

Despite being illegal under the *Criminal Code*, polygamy is practised by Fundamentalist Mormons in Bountiful in the British Columbia interior, a community established in 1946 by Fundamentalist Mormons from the United States, and in some nearby communities in Alberta. It is estimated that about 1,000 people live in polygamous families in this area. However, despite being relatively well established, much of what is known about the Fundamentalist Mormon families in British Columbia and Alberta is provided by media accounts; very little published research or literature on these communities exists.

Media accounts indicate that Fundamentalist Mormon families lived in relative anonymity until the early 1990s, after sexual abuse charges were laid against several male members of the Bountiful community and the Royal Canadian Mounted Police (RCMP) began an investigation into allegations of polygamous marriage (Dawson 1990; Todd 1991a, 1991b). The RCMP investigation concluded with the recommendation that two of the community's leaders should be charged with polygamy under the *Criminal Code*. However, the Attorney General of British Columbia did not lay any polygamy charges as it received a legal opinion that the polygamy provisions of the Code violated the *Canadian Charter of Rights and Freedoms* guarantees of religious freedom (Weatherbe 1993; *The Kitchener-Waterloo Record* 1993; *Economist* 2004), though three male members of the community were convicted of sexual offences.

Since the police investigations in the early 1990s, there has been considerable media attention paid to the polygamous community in Bountiful. As the legal and legislative debate continued, several social issues surrounding polygamous family structure were raised in the media. Questions concerning allegations of child abuse and incest, the inequality of women in polygamous relationships, and the legality of polygamous unions in Canada were frequently debated, often resulting in criticism of the practice of polygamy in Bountiful (Dawson 1990; *The Windsor Star* 1991; Todd 1991a, 1991b; McLintock 1992; Weatherbe 1993; *The Kitchener-Waterloo Record* 1993; Zurowski 1992a, 1992b). Questions have persistently been raised about the relationship between the practice of polygamy and the abuse of children and women. Although community leaders and spokespersons have strongly asserted that any form of abuse or maltreatment is rare, ex-members detailed many instances of inappropriate behaviour, and child and spousal abuse that occurred in the community (Egan 1999). Media accounts drew on the reports of ex-members, who spoke of the problems inherent in Mormon polygamous families: sexual, spiritual, physical and emotional abuse, and neglect of children, the tensions among wives, and the lack of involvement of fathers in raising their children (*The Windsor Star* 1991; Todd 1991a; *The Kitchener-Waterloo Record* 1993; Egan 1999; Rhodes 1999; Matas 2002b; Milke 2005). According to some reports, families are so large that many live in poverty (Todd 1991b). Reports also raised concerns as to how women were treated in polygamous communities, discussing issues of gender inequality (Stirk 2002). The reports often referred to the patriarchal control exercised over women and children, which one ex-member claimed got to the point where women "lived in fear and couldn't think anymore" (Todd 1991a: D5).

Editorials in newspapers and advocacy groups have criticized the public funding of the school in Bountiful. It is claimed that this independent school indoctrinates children with patriarchal views toward women and the importance of polygamy in their attaining spiritual salvation (Weatherbe 1993; McLintock 1992; Matas 2002b; *Economist* 2004; Elsworth 2004; Bramham 2004b). These accusations also brought the quality of education that children were receiving in Bountiful into question. However, women living in polygamous marriages in the community (who were interviewed by the media on rare occasions) maintain that their experiences are positive, and that they are free to make their own decisions (Elsworth 2004; Bramham 2004a; MacQueen 2004).

Another police investigation began in 2004 to again consider laying charges in Bountiful, and to re-explore allegations of poor education, misuse of provincial education funds and the possibility of sexual, physical and emotional abuse, and neglect of children (Bramham 2004a, 2004c; *The Edmonton Journal* 2004; MacQueen 2004). New issues raised by the media accompanied this investigation. Specifically, reports focussed on the relationship between American and Canadian polygamous communities: the struggle for economic, religious and political power within the communities. Several articles reported that adolescent females were being trafficked between American and Canadian polygamous communities, to enter into arranged polygamous marriages (Matas 2002a; *Economist* 2004; Baron 2004; Elsworth 2004; *Daily Press* 2005; Bramham 2005; *National Post* 2005). A related issue is immigration, with articles criticizing Canadian authorities for allowing American female adolescents and women to gain entry to Canada to live in polygamous relationships (Bramham 2004b).

The growing number of members leaving their polygamous communities in Canada and the United States has also been a subject of media attention. According to recent reports, many of those leaving these communities are young men who have experienced physical and emotional abuse. These youths have found the transition to "the outside" a "jarring, confusing, and lonely experience" (Armstrong 2005: A7). Most have limited education and employment skills. Some of these young men have left their communities, because they do not want to participate in plural marriages, but as discussed below, in the United States it is clear that large numbers of adolescent and young males are being forced to leave Fundamentalist Mormon communities to ensure that it will be possible for the "chosen" men to have multiple wives.

Members of the Fundamentalist Mormon community in Bountiful have long been reluctant to speak to the media, but in April 2005 there was a dramatic change, perhaps reflecting a split in the leadership of the community or a belief that changing Canadian laws and attitudes toward same-sex marriage may presage changes in attitudes toward polygamy. On April 19, 2005, a group called the Bountiful Women's Society hosted a "Polygamy Summit," inviting the media and members of the public to a public meeting where they defended polygamy as a "freely chosen lifestyle" (Hutchison 2005: A3). They listed such benefits as the pooling of resources and sharing of housework, as well as the opportunity to marry a man who had "proven" himself. They also denied reports that women are forced to marry against their will or that adolescents were being pressured to marry. One woman, who identified herself as Leah Barlow, a registered nurse and midwife, was quoted as saying:

"We are women that have chosen the Bountiful lifestyle. We love it and we believe in it. We know better than any of you what our culture is like. It's not for everyone, but for us it's the right choice and we wouldn't change it for anything in the world" (*Montreal Gazette* 2005: A10).

Three women from Bountiful also appeared on "Dr. Phil" on May 24, 2005. One of them, "Ruth," stated that she was in a polygamous marriage, with her husband having more than 12 wives. She observed:

> I have a great deal of love and respect for my husband. But I feel free to make my own choices.... I feel like polygamy should be decriminalized. I don't necessarily think it should be legalized, but I think it should be decriminalized. And the reason is polygamy does not equal abuse. We have a lot of functional families that are raising their children with choice. We don't deserve that stigma.

Another woman on the show, "Julia," commented on growing up in a polygamous family: "I love my family. I had five mothers and it was great. I enjoyed my childhood. I call them all 'mother,' but I have a special affection for my [biological] mother."

It is impossible to know if those women interviewed in the media and on talk shows are representative of their community, or whether they have been pressured into making positive statements. Other women interviewed in the media who have left the Bountiful community describe abusive and unhappy marriages, and being coerced into marriage, sometimes at a relatively young age. Although media reports and television shows on polygamy in Canada have been frequent in recent years, these provide only limited, superficial information. However, two non-media sources provide significant, detailed information about the practice of polygamy in the Fundamentalist Mormon community in Canada: the 1993 report by the Committee on Polygamous Issues (1993) and Peters' (1994) graduate thesis.

Available Canadian Literature

The 1993 Committee on Polygamous Issues examined issues surrounding the community of Bountiful, British Columbia. The Committee consisted of social service professionals in the area and former members of the community. The report produced by this Committee describes the history and religious beliefs of the community, as well as the effects of polygamy on women and children. According to the Committee, for women, the structure and ideology of a Fundamentalist Mormon community in itself is extremely restricting. "Within this determinedly patriarchal community, women's access to power is limited, first by the role defined for them by the theology and second by the structure of their families" (Committee on Polygamous Issues 1993: 12). According to the Committee, the indoctrinated conformity and lack of personal empowerment for women leads to an underdeveloped sense of self, an inability to understand or exercise choice, and a blurring of personal and collective identity. This conformity is largely a result of early religious instruction and education of children, as well as the isolation of the community: children are isolated so the education and religious teaching are not influenced by the outside world. Further, this instruction helps to establish the children's life course. Through their education and upbringing, girls are prepared to be wives and mothers, and to "be sweet," that is accepting of domination by their husbands and the church. Boys are prepared to work. The Committee also points to the academic delays experienced by many of the children. Given the focus on religious instruction in the school, children do not have the benefits of the education received by other children in Canada. Children who left Bountiful and joined the regular school system were far behind other students of the same age.

The size of polygamous families is also a significant issue. Each wife is expected to have several children, typically five to ten, and there are several wives for each husband. Although children are surrounded by many sibling role models, and may receive care from more than one maternal figure, they receive less care and attention as more children are added to the family. Both mother and father become less available, and the bonds between parent and child weaken. In some cases, all the wives and children live in a single residence, but it is not uncommon for wives who are less favoured to reside with their children in smaller, less adequate buildings near the husband's main home. The size of the family ultimately affects economic opportunities: the more wives and children, the fewer resources available for each family member.

The preservation and continuation of the Fundamentalist Mormon community is a theme in the Committee's report. As identified by Egan (1999), limiting contact with the broader society and secrecy play a large role in Fundamentalist Mormon polygamous families and communities. This secrecy was addressed by Peters (1994) in a rare participant observation thesis study of Fundamentalist Mormon life in Canada. Both women and children are taught to avoid contact and communication with individuals outside the community. Peters (1994: 10) concluded that this secrecy, as well as the "deceptively idyllic accounts" provided by group members throughout the course of her research, prevented her from gaining a credible understanding of the community. Secrecy, according to Peters, plays a dichotomous role in preserving the sanctity of the leadership and community. Leaders withhold information about the community from the outside world to avoid investigations by the authorities and stigma. This lack of contact, however, has, to a certain extent, contributed to sensationalist media reporting. As Peters (1994: 42) identified, media headlines express a "general concern with power, secrecy, and sex," as opposed to a genuine interest in understanding the community. At the same time as restricting contact from the outside world, leaders withhold information from members of their communities about the outside world to shelter them from ideas that might upset relationships within the group; this also helps them maintain their power and control. Consequently, members have become very dependent on their leaders, which Peters (1994: 40) argued may result in an abuse of power: "Having ultimate power, some Fundamentalist leaders exploited their devotees unwittingly or wittingly in order to obtain sexual, material, and/or ego gratification."

What is apparent in both Peters' research and in the report by the Committee on Polygamous Issues is that the polygamous community has a lifestyle that constitutes a unique culture, one that has been subjected to only limited research. Given the limited literature on Canadian polygamy, a better understanding of polygamy can be gained by considering research and media reports from other countries.

United States – Fundamentalist Mormons

The literature available on polygamy in the United States is perhaps most relevant to the Canadian context, given similar social, economic and political conditions in both countries, and the fact that the largest polygamous groups in both countries are Fundamentalist Mormons. Although the body of social research on American polygamy is also limited (again due to difficulty in accessing the population), parallels to the previously discussed issues in Canada are evident.

The social science literature focussing on the experiences of women in American Fundamentalist Mormon polygamous communities primarily deals with the tension and stress inherent in polygamous unions. Recent research has addressed the conflict between the dyadic relationship of husband and wife and the plural relationships of a polygamous family (Altman 1993; Altman and Ginat 1996). The attributes of Fundamentalist Mormon families (i.e., patriarchal structure, devaluing of emotionality for men, procreation as a primary goal of marital unions, and the obligation of women to be obedient and preserve familial harmony) undermine the dyadic spousal relationship. Women often *expect* to have an emotional bond to their husband, but the reality of their marriage is quite different, particularly when new wives join the family (Jankowiak and Diderich 2000). While measures are taken to preserve family harmony (i.e., asking permission of previous wives, collectively choosing new wife, etc.), the addition of a new sister wife is often accompanied by feelings of disapproval, neglect, betrayal and loneliness by senior wives. Their disapproval, however, is often overshadowed by expectations for positive behaviour (i.e., co-operation, obedience) (Altman and Ginat 1996; Altman 1993). Further, despite receiving more attention, new wives may be envious of the already established relationships between senior wives and the husband, and may be uncomfortable with living in the home established by the senior wives. Thus, a new addition to the plural marriage can be very stressful for all involved; however, as Altman (1993) identified, some plural families develop strategies that can minimize this tension and which, in some cases, preserve functional family harmony.

Children of Fundamentalist Mormon families experience the effects of internal and external conflicts inherent in their communities. As identified by Altman (1993), children are taught the religious importance of plural marriage and familial solidarity in their families, community and school, but concurrently receive contradictory messages about “monogamous values” from the media and nearby “outside” communities. Further, Jankowiak and Diderich’s (2000) research revealed that although there is normative (ideological) support for family solidarity, children still emotionally and cognitively associate more closely with the other children of their biological mothers. Mothers also tend to favour their own children, despite the tenet that they take responsibility for all. These elements combine to “undermine the principle of sibling solidarity and thus the ability to sustain the plural family” (Jankowiak and Diderich 2000: 135). Further, the discouragement of emotionality of men, combined with the large number of children in plural families, results in weak bonds between fathers and children. Thus, despite religious doctrine asserting the value of children maintaining loyalty to their father, emotional ties of children to their fathers are often weak (Altman and Ginat 1996). This family dynamic has the potential to produce confusion in children, who struggle to reconcile their religious instruction with the reality of their home life.

Research also points to the socio-economic demands of the plural family and the resultant financial difficulties experienced. Specifically, Altman (1993) pointed to the large number of children, few high-paying occupations available in the community, and the lack of education of adults as contributing to poverty. Further, in most Fundamentalist Mormon communities in Canada and the United States, families are expected to contribute to the United Effort Plan (UEP), an association established to conduct the business and control the property of the Fundamentalist Church of Jesus Christ of Latter Day Saints (Committee on Polygamous Issues 1993). These donations diminish the resources available to support the family, and result in community leaders having control over much of the property and business in their communities.

United States – Muslim

While polygamy is most common among Fundamentalist Mormons, there are also some Muslim polygamists in the United States. However, the actual incidence of these families is undetermined, and there is very little available literature on Muslim polygamists in North America. Hassouneh-Phillips' (2001) research provides a rare glimpse into American Muslim polygamy. As part of a larger study of spousal abuse in American Muslim families, she interviewed Muslim women in the United States who had experienced abuse, or knew a family member or friend who had been abused. Most of the women who had experience with polygamy reported that they or their mothers entered polygamous marriages unwillingly, some likening it to "legalized adultery" (Hassouneh-Phillips 2001: 740). The arrival of new wives in the family was described by the women as a traumatic experience for the senior wives and their children. The issue of inequitable treatment of wives by their husbands was a major concern. Women looked to their husbands to be fair and supportive, and to maintain healthy relations between wives, as required by the Koran, but in actuality the husbands treated the wives unequally, and often abusively. However, despite their discomfort and feelings of disempowerment, these women adhered to the cultural value of preserving the family unit (as is the case for Fundamentalist Mormon wives) to avoid shame and embarrassment. Hassouneh-Phillips' research ultimately suggests that although these women did not perceive polygamy itself to be abusive (especially given its religious justification), they believe that their experiences were a *misuse* of it.

Polygamy Research Outside of North America

A majority of the social science research on the effects of polygamous marriage on women and children has been conducted in countries outside North America. As identified by Elbedour et al. (2002), polygamous marriage continues to be widely practised in the Middle East and Africa, despite the growing international rejection of its practice. Studies on Arab populations in Israel and African polygamy comprise a majority of those found in the literature.

Middle-East (Bedouin Arabs in Israel)

Polygamy is a relatively common practice among the Bedouin Arabs of the Middle East, despite a decline in polygamy worldwide. Polygamy is practised as a result of the Koran's provision that a man may marry up to four wives, provided he has the resources to do so. Exchange marriages are also a common occurrence; traditionally, two males may marry each other's sisters, then if one takes another wife in the future, the other feels pressure to do so as well. The literature indicates that, in some cases, Bedouin Arab polygamous families are able to develop relationships that minimize conflict and tension among wives and stepchildren (Al-Krenawi and Graham 1999). Further, Bedouin-Arab women have reported benefits to plural marriage, such as "sharing household workload, site companionship and socializing with other women, greater autonomy because other wives will take care of the children, and other responsibilities" (Elbedour et al. 2002: 262). However, most research indicates that the family itself is a site of oppression for Middle Eastern women, despite their social status being based on it (Al-Krenawi and Graham 1999).

Bedouin-Arab social structure is highly patriarchal, with men having authority in all facets of the family and women expected to be self-sacrificing, to maintain sexual integrity and bear many children, especially boys (Al-Krenawi et al. 2001, 1997). Consequently, women's status is based on marriage and having children, as well as their adherence to expectations of behaviour. A husband's first marriage in this culture is often arranged, with subsequent marriages more likely to be based on love and choice. Therefore, being a second wife often results in a better outcome than being a first wife. Studies indicate that first wives in Bedouin-Arab society tend to experience the worst effects of plural marriage; preferential treatment, economically and emotionally, is often given to the younger, junior wives (Al-Krenawi and Graham 1999; Al-Krenawi 2001). As a result, there is often much tension and competition between wives, an element that is common to most polygamous family structures. Mental health problems are common among Bedouin-Arab women in plural marriages, particularly for those women whose union was arranged, women who bear more daughters than sons, and women who are senior wives. Research indicates that low self-esteem, depression, nervousness and somatic symptoms are especially common, particularly among senior wives (Al-Krenawi 1999, 2001; Al-Krenawi et al. 1997, 2001; Elbedour et al. 2002). Consequently, Bedouin-Arab women in plural marriages are more likely to become psychiatric patients (Chaleby 1985, 1987).

Preferential treatment is often manifested in the unequal distribution of resources to wives and their children, particularly senior wives. Demographically, research suggests there is a negative relationship between polygamy and socio-economic status, which is contrary to the Koran's provisions that polygamy is only to be practised if the husband can properly support all wives and their children (Elbedour et al. 2002; Al-Krenawi 2001). Further, while the Koran stipulates that men may only marry up to four wives, it is not uncommon for men to have more. As a consequence, these growing families often strain the father/husband's resources to the point where wives and children (especially less favoured ones) live in poverty (Al-Krenawi and Graham 1999; Al-Krenawi et al. 1997, 2001).

As compared to research in other countries, there is a wealth of literature from Israel on the experiences of children in polygamous Muslim families. There is evidence that polygamous families can have positive benefits for children, including the presence of many role models, greater abundance of affection (benefiting mental health) and more parental attention (from many mothers) (Elbedour et al. 2002). However, there is a greater indication in the literature that the harmful effects of polygamous marriages on mothers, and the pressures of the polygamous family in general, have more negative effects than positive effects on children.

For example, studies reveal that their mother's mental health and the degree of tension among wives is associated with behavioural, psychological, interpersonal, academic and adjustment problems in children (Al-Krenawi 2001; Al-Krenawi et al. 2001). Researchers (Al-Krenawi et al. 2002; Al-Krenawi and Lightman 2000) hypothesized that the addition of new wives and children causes a major systemic disruption in the family, providing less stability for children of senior wives, reducing their self-confidence and security, and causing increased anxiety. Furthermore, the addition of a new wife and children to the family produces distance between the children of the senior wives and their father, to the point where children may not recognize him at all (Elbedour et al. 2002; Lev-Wiesel and Al-Krenawi 2000).

This distance between father and child may be one factor that contributes to children and adolescents from polygamous families appearing to have a greater tendency to experience mental health difficulties than children from monogamous families. Al-Krenawi and Graham (1999), and Al-Krenawi et al. (1997) suggested that children's (particularly children of senior wives) psychological needs are often neglected in polygamous families, largely due to the poor relationship between children and their father. For adolescents, research suggests that those raised in polygamous families are more likely to demonstrate high levels of interpersonal sensitivity, depression, and paranoid ideation, as well as more problematic family functioning (Al-Krenawi et al. 2002). Physical abuse is also documented as a more common problem in Bedouin-Arab polygamous families than in monogamous families (Al-Krenawi 1999; Elbedour et al. 2002). These experiences may, in part, be due to the socio-economic effects of polygamous family structure. Financial distress in the family is associated with parental intolerance (which may lead to child abuse and neglect), depression, antisocial behaviour, poor impulse control, poor academic outcomes, low self-concept and a higher incidence of health problems (Elbedour et al. 2002). Often children's instrumental needs (e.g., school supplies, clothing) go unmet in polygamous families (Al-Krenawi and Graham 1999; Al-Krenawi et al. 1997).

In sum, the research suggests a number of consequences for Bedouin-Arab children living in polygamous families. However, mediating factors such as poverty, family conflict, stage of development, and lack of attachment to the father may also contribute to explaining the harmful effects these children experience (Elbedour et al. 2002; Al-Krenawi et al. 2002). Further, in communities where polygamy is supported and valued, children's vulnerability to family disruption may be reduced given the collective support available (Elbedour et al. 2002).

It is important to recognize the macro-issues that may impact the experiences of women and children. The published research about Arab polygamous families has been conducted in Israel and its occupied territories. Israeli law considers polygamy illegal, yet the law is not enforced for political reasons; as Al-Krenawi and Graham (1999: 499) identified, "[t]urning a blind eye to the plight of women in polygamous marriages…reinforces the ideological construction of the polygamous family and the exploitation of women." However, as Al-Krenawi et al. (2001: 6) recognized, the degree to which a family or community adheres to traditional values is largely determinative of the quality of life of women and children in polygamous Arab families. "Familial economic, social and emotional support may be tacitly conditional on obedience to traditional norms." Thus, the degree of acceptance of socio-cultural norms may have advantages for women and children in polygamous families.

As is the case in North America, researchers indicate that more knowledge of polygamous marriage is required by practitioners to develop more inclusive and less discriminatory strategies for assisting women and children. Al-Krenawi et al. (1997) and Al-Krenawi (1999) identified culturally sensitive interventions which might help women and children by encouraging adherence to the Koran (i.e., treating wives equally, preservation of harmony, peace, well-being of family). Practitioners must understand polygamous marriage within the distinct ethno-cultural context in which it exists (Elbedour et al. 2002; Al-Krenawi et al. 2001).

Africa

Polygamy, according to Anderson (2000), is more common in Africa than anywhere else in the world today. It is a socially accepted practice among tribes and communities in a number of African countries, particularly those in the western region (Timaeus and Reynar 1998). According to Elbedour et al. (2002) and Bergstrom (1994), in some parts of Africa an estimated 20 to 50 percent of all marriages are polygamous. Polygamy in Africa is encouraged by diverse factors, and its prevalence reflects differences in tribes and religions, as well as in economic and social structures. Many Africans in plural marriages are Muslim, but some non-Muslim men enter plural marriage for economic, status, or social reasons (Madhavan 2002; Ezra 2003; Klomegah 1997; Meekers and Franklin 1995). For women, ethnicity, location (rural vs. urban), religion, and most of all, education determine whether a woman is married polygamously: women with higher levels of education are significantly less likely to marry polygamously (Elbedour et al. 2002; Ezra 2003; Agadjanian and Ezeh 2000; Timaeus and Reynar 1998; Klomegah 1997). However, polygamy in Africa is becoming increasingly contested due to economic difficulties inherent in this type of relationship, and the increasing influence of western Christian ideology (Simmons 1999; Timaeus and Reynar 1998; Anderson 2000). Studies indicate that polygamous marriage in Africa is declining due to the increased cost of living, an increase in the education of women, and a gradual change in the status of women — to the degree that women are beginning to show resistance to polygamy (Anderson 2000; Madhavan 2002; Timaeus and Reynar 1998). Polygamy is less prevalent where there are higher levels of education and urbanization. While some groups hail the decline in the practice of polygamy, there is a conflict between the desire to protect African cultural traditions and increasing pressure to recognize women's rights (Simmons 1999; *Economist* 1996).

Experiences of women in African polygamous families vary with the socio-cultural features of their surrounding tribe, community or region. Most, if not all, follow a patriarchal structure; however, the degree of authority held by the husband often depends on the cultural and social expectations for his behaviour (Madhavan 2002; Agadjanian and Ezeh 2000). According to Madhavan (2002), the degree of co-operation or competition among a husband's co-wives depends on a number of factors, both internal and external to the family. Internally, families that are collectively loyal to their household, maintain a non-exploitative co-wife hierarchy, have problem-solving systems that ensure equality (e.g., rotation, incentives), and whose co-wives are close in age, are better able to preserve a positive, harmonious family setting. Gwanfogbe et al. (1997) suggested that senior wives in such co-operative situations are often more satisfied than junior wives, as they receive support and assistance for pre-existing responsibilities from the other women. The resultant benefits of polygamous unions include sharing the household workload, companionship and social contact, greater autonomy from the husband, economic gain (one wife may work in the paid labour force while others care for the children) and assistance with child rearing (Anderson 2000). Externally, highly collectivist communities stress co-operation and equality, discourage jealousy and place less value on wealth and physical beauty. These are the ones where women and children experience fewer negative effects of polygamy (Gwanfogbe et al. 1997). Further, women have a more positive experience in tribes that place a high value on maternity; women are encouraged to collaborate on bearing children and child rearing, share their knowledge, and assist one another in day-to-day activities (Madhavan 2002; Elbedour et al. 2002). Thus, the degree of harmony in African polygamous families is largely a product of the values of the family and relatedly, the tribe or community: that is, whether status is related to competition or collaboration.

Research indicates that there are communities where women have very negative experiences with polygamy, riddled with unhappiness, abuse, unequal treatment, and lack of emotional and financial resources (Meekers and Franklin 1995; Madhavan 2002; Agadjanian and Ezeh 2000). These are communities where the initial marriage is likely to have been arranged, which leaves the first wife feeling disempowered, and additional marriages may take place without consent or approval by senior wives. In areas where there is a high level of gender inequality, women tend to have very little control over reproduction, limited access to financial resources and minimal influence in the selection of their partner.

Research on the effects of polygamous families on children in Africa is not extensive. Available literature indicates a predominantly negative impact. Owuamanam's (1984) study of Nigerian adolescent self-concept indicated that polygamy adversely affects adolescent self-concept despite having a larger extended family. Father–child interaction is often inadequate in polygamous homes, leading to a lack of identity with significant others and diminished self-concept. Further, lowered self-concept may be related to competition among half-siblings, who must vie for a place in the family; in contrast, children of monogamous homes each *inherit* a special place. Owuamanam argued that as a result of there being fewer children requiring attention, monogamous homes provide more intimate contact with significant others than in polygamous homes, despite being smaller in size. In terms of effects on academic achievement, Cherian (1990) found that mean achievement scores were significantly lower for children of polygamous versus monogamous families, speculating that the conflict, anxiety and stress resulting from co-wife and step-sibling rivalry impedes academic progress. Further, children have less contact with their father, and consequently, less security. Despite these negative findings, it must be noted that the available literature is limited to certain groups and countries; outcomes likely vary in different African cultural environments.

France

Recent research on polygamy in France, specifically on the experiences of African (Malian) immigrants, raises the issue of the conflict of immigrant laws and customs with those of the dominant Western society, an issue also raised by Muslim immigration to Canada. Sargent and Cordell (2002) examined this conflict in the French context, noting the difficulties Malian women and children in polygamous unions experience in France; household incomes are low and co-wives, who typically had separate dwellings in their country of origin, are forced to live together in cramped quarters. There is often considerable conflict between co-wives. With the need for monetary income once living in France, wives in polygamous marriages may enter the paid work force for the first time. While these women generally have unskilled work (e.g., as cleaners), this change in roles for women decreases the power and authority of the husband in the family. Further, contact with social services in France provides women with information concerning fertility and birth control, information that was not made available in Africa due to the cultural value placed on fertility.

The conditions of polygamy in France result in considerable feelings of discontent among immigrant women. With research suggesting that as many as 75 percent of Malians in France were practising polygamy, the French government felt obliged to address the issue (Sargent and Cordell 2002). Before 1993, men who had entered into a polygamous union in their country of origin could bring all their children and their first wife into France; further, multiple wives could immigrate to be reunified with husbands and children legally in France, citing polygamy as their marital status. However, in 1993 legislation was changed to prohibit reunification of husbands and plural wives in polygamous marriages. As Sargent and Cordell (2002: 1964) identified, "the conjuncture of increasingly restrictive immigration policies, an implicit French policy of encouraging contraceptive use among immigrants, continued pronatalism among Malian men, and tensions surrounding polygamy has generated a crisis in the area of reproduction." Malian immigrant women in polygamous unions living in poverty themselves resist having more children, an act of resistance to traditional Malian customs, but in support of France's policies.

Conclusion: General Themes and Issues

For North America in particular, research on polygamous families is limited, at least in part due to the difficulty in accessing this population. The secrecy of these communities is identified by both Canadian and American researchers on polygamy as a major problem in doing research (Jankowiak and Diderich 2000; Peters 1994), making it difficult to contact and gain reliable information from community members. However, recent international literature reveals that although polygamy exists in unique socio-cultural contexts in various parts of the world, there are common themes.

One theme is that relationships between husbands and wives are defined by the difficulties inherent in plural marriage by patriarchal norms. Polygamy is practised among groups that have strongly patriarchal values, and may not believe in gender equality. While competition between wives for economic benefits, status and affection is at the root of many of the problems that exist in polygamous marriages, the subordination of women also defines the relationship between the husband and each wife (Altman 1993; Elbedour et al. 2002;

Al-Krenawi and Graham 1999; Agadjanian and Ezeh 2000). Even in cultures where conflict among wives and children is limited and polygamy is strongly encouraged by the community, unequal treatment of wives, mistreatment of women and jealousy are consistently identified as the difficulties experienced in polygamous families (Madhavan 2002; Altman and Ginat 1996).

Research across cultures consistently reveals that women in polygamous families experience greater emotional and mental health difficulties than women in monogamous relations, while the children of polygamous families are more likely to have limited educational achievement and experience emotional difficulties (Committee on Polygamous Issues 1993; Al-Krenawi 2001; Al-Krenawi and Lightman 2000; Al-Krenawi and Graham 1999; Al-Krenawi et al. 1997). However, the effects of polygamy are mediated by such factors as socio-economic status, level of education, community support, cultural acceptance, size of the family, co-wife co-operation and conflict resolution mechanisms (Elbedour et al. 2002; Al-Krenawi et al. 2002; Madhavan 2002; Gwanfogbe et al. 1997).

There is also consensus internationally that teachers, social workers and community organizations require increased awareness of the needs and experiences of women and children living in polygamous families (Al-Krenawi et al. 2002; Elbedour 2002). An appreciation of the stigma that members of plural families face in the broader community is also necessary. The members of polygamous families often experience rejection and ridicule from the wider community, which is a source of stress and discomfort. As Altman and Ginat (1996: 438) identified, members of these communities often feel "isolated, rejected, misunderstood, and even threatened" by society, thereby contributing to the secrecy and protectionism that pervades polygamous communities, particularly in North America. Members of polygamous families in North America must constantly negotiate the demands of their immediate family unit and their religious community against the pressures from the broader society which rejects their way of life.

While there are clear trends in the research on polygamy, further research on the effects of plural marriage on women and children is vital to both understanding and assisting individuals in such groups, particularly in North America. How do women and children in Canada experience polygamy? What do men in these communities feel about these relationships, both those who stay and those who are forced to leave? What do members and ex-members of these communities think should be done to help individuals in these communities, especially women and children?

3. LEGAL TREATMENT OF POLYGAMY: OTHER COUNTRIES

The Trend Toward Prohibition of Polygamy: The International Context

There are three major issues in regard to the legal treatment of polygamy in Canada and in other countries.

- Will a state allow people to enter into a legally valid polygamous marriage?
- If a state does not allow people to enter into a legally valid polygamous marriage, will the state nevertheless recognize a polygamous marriage that was validly entered into in a country where such marriages are legal, at least for some legal purposes?
- Is entry into or cohabitation within a polygamous union a criminal offence?

Many states in Asia and Africa allow for legally valid polygamous marriage. However, with growing recognition of the importance of gender equality and increasing concerns about the effects of polygamy on women and children, there has been a clear trend over the past century towards the enactment of laws to abolish polygamy. There is now explicit legislation to declare invalid or criminalize polygamous marriages in at least eight European countries, fourteen American countries, nine Asian countries and seven African countries.[2]

Among the countries that have prohibited polygamy are several with predominantly Muslim populations. Tunisia prohibited polygamy more than 40 years ago (von Struensee 2004). Turkey, which has a predominantly Muslim population but is officially a secular rather than Islamic state, abolished polygamy in 1926.[3] Furthermore, in Bangladesh, a country that still allows polygamy, in *Jesmin Sultana v. Mohammed Elias*, the High Court questioned, on its analysis of the Koran, whether Muslim law truly permits polygamy in the modern context.[4]

Of the countries that still permit polygamy, a number are moving toward limiting or abolishing the practice. In Uganda, for example, a bill tabled in December 2003 before Parliament limits to four the number of wives a man may have and requires the existing wife or wives to consent, in court, in order for the husband to marry an additional wife (von Struensee 2004). Before a man is permitted to marry an additional wife, he must also show that he has the financial capability to maintain an additional wife and children, and that he is capable of giving the same treatment to all the wives. While this bill is not a complete prohibition on the practice of polygamy, it is a significant change from the current law, and controversial in Uganda, where there is no maximum number of wives one man may marry and no requirement that the previous wives consent to any additional marriages.

In Morocco, the Minister of Justice announced in February 2005 that there had been a 10 percent decrease in the number of new polygamous marriages during 2004. He attributed this decrease to the changes to Moroccan family law, which went into effect in 2004 and were intended to strengthen women's rights (Agence France Presse French Wire 2005).

At the international level, while polygamy is not explicitly prohibited in any international treaties, it violates such basic human rights as the right to protection of the dignity of women, the right to equality within the family and the right to equal protection of women under the law (von Struensee 2005). It is widely accepted that the practice of polygamy is inconsistent with article 16(1) of the Universal Declaration of Human Rights, which provides that men and women are entitled to equal rights as to marriage, and article 16(1)(b) of the *Convention on the Elimination of Discrimination against Women*, which guarantees the right to freely choose a spouse and enter into a marriage with free and full consent. Further, polygamy is inconsistent with article 23(4) of the International Covenant on Civil and Political Rights, which requires state parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage. Those provisions refer to the institution of marriage as based on the equality of the husband and wife. von Struensee (2004: 2, 21) argued that "the practice of polygamy directly contradicts the principle of equality because it grants one spouse the unilateral right to take multiple partners without spousal consent and then requires the first spouse to share the resources of the marriage as a result of that decision."

In 1994, the United Nations Committee on the Elimination of Discrimination against Women focussed on the rights of women within the context of the family and analyzed articles of the *Convention on the Elimination of Discrimination against Women* that relate to polygamy.[5] Though the Committee accepted that the "form and concept of the family can vary from State to State,"[6] the Committee was emphatic that polygamous marriages are not acceptable, because they violate women's right to equality with men. The Committee expressed its concern about practices in several countries as "[p]olygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited."[7] The Committee concluded that in several states the continuing practice of polygamy violates constitutional guarantees of equal rights for women, as well as Article 5(a) of the Convention, which requires state parties to work toward the elimination of practices founded on sex-based prejudice or stereotypes.

The Council of the European Union also addressed the issue of polygamy, directing states to limit immigration by parties to polygamous marriages. The Council published a directive on September 22, 2003 about family reunification.[8] It applies to all European Union member states, with the exception of the United Kingdom, Ireland and Denmark. The directive states that, out of concern and respect for the rights of women and children, it is acceptable for member states to use "restrictive measures" against applications for reunification from polygamous families.[9] Under paragraph 4 of article 4, the directive states: "In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse." Article 4 also provides that Member States may "limit the family reunification of minor children of a further spouse of the sponsor."

Legislation prohibiting and criminalizing polygamy is not uncontroversial. In a number of countries, such legislation has been attacked as unconstitutional, principally on the basis that it violates constitutional guarantees of freedom of religion, but these laws have survived those challenges.[10]

In the next section, we consider the legal treatment of polygamy in a number of industrialized western countries. All of these countries have predominantly Christian heritages and a tradition of monogamous marriage, but all also have growing Muslim populations and are having to address issues related to the recognition of polygamous marriage. In the United States, as in Canada, there is also a domestic tradition of Fundamentalist Mormon polygamous communities going back over several generations.

Western Countries with Growing Muslim Populations

Australia

Section 94 of the Australian *Marriage Act, 1961* makes it a criminal offence for a person who is already married to go through a second form of ceremony of marriage,[11] making entry into a polygamous marriage in Australia a criminal offence. Further, any such marriage is regarded as void in Australia and any other common-law jurisdiction. Under s. 6 of the *Family Law Act*, however, a polygamous marriage contracted in a foreign jurisdiction that permits for such marriages will be recognized in Australia for the purposes of that Act, including giving every wife in such a marriage the right to make a property or spousal support claim on separation, provided the spouses were domiciled in that foreign country when the marriage was entered into (Reynolds 2002).

For the purposes of immigration, however, if a man is married to more than one woman, he may only bring one wife to Australia (Australia 2002). Furthermore, the Australian Law Reform Commission noted that "recognizing the legal status of polygamy would…offend the principles of gender equality that underlies Australian laws" (Australia 1992: at para 5.10). In its 1992 report, *Multiculturalism and the Law*, the Australian Law Reform Commission recommended that Australia continue to recognize only polygamous marriages entered into in foreign countries, and only for limited purposes.

Germany

It is not possible to enter into a valid polygamous marriage in Germany (Fournier 2004). Germany will not allow a man to claim more than one wife for the purposes of being sponsored to immigrate to Germany (Rohe 2003). However, Germany gives limited recognition to polygamous marriages celebrated and valid in a foreign country, by permitting wives in a polygamous marriage to claim spousal support in German courts. Further, legislation provides that the death benefit payable under social security legislation to a widow in a monogamous marriage is to be divided equally among all widows if the husband entered into a valid polygamous marriage in a country that allows for such unions.

France

The French *Civil Code* provides that a married person may not enter into a second marriage while the first still exists, and French courts have repeatedly held that second marriages conducted in France are void and without legal effect (Fournier 2004). France will, however, recognize a foreign polygamous marriage as having limited validity in France if it was contracted in a country that recognizes such marriages as valid and if the spouses possess citizenship of that country. Between 1980 and 1993, France permitted the reunification of polygamous families, allowing men who were resident in France to bring more than one wife into France to live with them. This resulted in significant numbers of polygamous families living in France, principally with a West African origin.

Since 1993, the French government has been attempting to reduce the number of polygamous households. It was estimated in 1993 that as many as 150,000 people in France were living in polygamous families. Citing problems like large families resulting in lack of appropriate housing, heavy burdens on social services, and the detrimental effects that such relationships have on women and children, in 1993 France enacted legislation to require polygamous families to "de-cohabit" (France 2002). A male immigrant who has multiple spouses will not be given legal residence papers unless he resides with only one spouse. As well, only the first wife will be granted legal residence papers, and other multiple wives are required to separate from the husband before they can obtain legal residence papers. While those living in polygamous marriages are unable to work legally in France without a legal residence card, if they are parents of children with French citizenship (i.e., born in France) they cannot be deported.

Since 1993, men who married multiple wives elsewhere can legally bring only one wife and her children to France, while the children of the other wife or wives will only be permitted to join their father in France under limited circumstances (Fournier 2004). There have also been efforts in France to encourage "de-cohabitation" of multiple wives by disentitling them to social assistance if they reside with their husband. In practice, however, this can be very difficult to police.

United Kingdom

One cannot enter into a valid polygamous marriage in England. Although there is no criminal offence of polygamy, bigamy is a criminal offence under the *Offences Against the Person Act* s. 57, which effectively makes it an offence to enter into a polygamous marriage in England. However, under the *Matrimonial Causes Act, 1973*, the United Kingdom considers marriages contracted on or after August 1, 1971 as being valid, if both parties had personal capacity under the law of their respective domiciles to enter into the marriage and if the marriage is valid in the country in which it took place. This allows for the legal recognition for certain family law purposes of polygamous marriages in England.

The United Kingdom has a policy of "prevent[ing] the formation of polygamous households" in the United Kingdom.[12] This policy is achieved, in part, through s. 2 of the *Immigration Act, 1988*, which allows only one of the wives involved in a polygamous marriage to be sponsored by her husband to immigrate to the United Kingdom. In a debate over the enactment of that Act, then Home Secretary Douglas Hurd stated that the number of polygamous wives entering the United Kingdom was minimal, but that "polygamy is not an acceptable social custom in this country."[13] Shah (2003: 392) argued that, while polygamy was originally prohibited in Britain because of arguments grounded on the Christian view of marriage in that country, those arguments have now "metamorphosed into the unacceptability of the custom on grounds of 'community relations' or the norms of gender equality and human rights."

Although generally only one wife is permitted to enter England, the *Immigration Act, 1988* provides for an exception in the case of a wife who entered the United Kingdom before August 1, 1988 and was admitted on the basis of her marriage. The Act also provides for an exception in the case of a woman who entered the United Kingdom after her marriage and while her husband was not living in the United Kingdom with a different wife. Shah (2003) noted that, under the Immigration Rules, a second wife could, in theory, also enter the United Kingdom as a visitor or a refugee, and observed that some multiple wives and their children may be living with their husbands in England illegally.

Under the Immigration Rules, para. 296 of HC 395, if a wife party to a polygamous marriage is denied entry, her children will be denied entry as well. Under certain extenuating circumstances, such as the death of their mother, those children may qualify for entry to live with their father.[14] It is also noteworthy that, to avoid a potential claim of gender discrimination, para. 278-280 of HC 395 were amended to include polyandrous marriages (one wife and more than one husband), as well as polygynous marriages (one husband and more than one wife).[15]

Ongoing concern about the practice of polygamy in the United Kingdom is indicated by the recently enacted *Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004*. Section 14 increases the powers of arrest of immigration officers to include a situation where the immigration officer has formed a reasonable suspicion that a person has committed or attempted to commit one of a number of crimes, including bigamy.

The *British Human Rights Act 1998* came into force in October 2000, prompting media reports that the British policy of not permitting polygamous marriages might be vulnerable to a human rights challenge under the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (Malik 2000). Article 12 of the Convention, which guarantees the right to marriage and to found a family, was incorporated into British law by the *Human Rights Act 1998*.[16] However, while the Directive of the Council of the European Union (discussed above) to limit immigration by parties to polygamous marriages is not directly applicable to the United Kingdom, it may well be indicative of how the Convention will be interpreted, suggesting that the United Kingdom policy does not violate the Convention.[17]

United States

Bigamy is an offence in all states of the United States, which makes it an offence to enter into a polygamous marriage. Several states, including Utah, Texas, Colorado and Rhode Island, have specifically defined "bigamy" to include cohabitation in a polygamous relationship, not just multiple marriages.[18] In the United States, the issue of polygamy has most frequently arisen in relation to Fundamentalist Mormons (Rower 2004), who have continued to practise polygamy after the main Mormon Church ceased to endorse polygamy in the 1890s. In 1878, in *Reynolds v. United States*,[19] a conviction for the offence of bigamy based on the practice of polygamy was upheld by the United States Supreme Court. At that time, the precepts of the Mormon religion, to which Reynolds belonged, required the accused to practise polygamy. The Court, however, held that the Free Exercise Clause protects religious beliefs, not practices, and that the proscription against polygamy was within Congress' power. The Court stated that, if it accepted the argument that the Constitution allowed a person to disregard the laws on bigamy that conflicted with his religious beliefs, it would "in effect…permit every citizen to become a law unto himself."[20]

A number of communities in the United States have significant numbers of Fundamentalist Mormon polygamous families, two of the largest being Colorado City, Arizona and Hildale, Utah. In 1953, the state of Arizona organized a raid, encouraged by Governor Pyle and members of the established Mormon Church, against the Fundamentalist Mormon polygamists living in Short Creek (as Colorado City was then called). More than a hundred adults were arrested for practising polygamy, and almost 300 children were taken from their parents' care and placed in foster homes under child protection agency care (Rower 2004). The raid was a public relations disaster for Governor Pyle, who had anticipated public support, but was instead voted out of office. The media portrayed the polygamists sympathetically, as persecuted, religious Americans. Many people were also angered by the tactics state officers used during the raid (Otto 1991). The negative aspects of polygamy, such as underage brides, were glossed over, while the focus was instead on photographs of government officials forcibly removing sobbing children from their mothers (Rower 2004).

One case to arise from the 1953 raid was *In re Black*,[21] dealing with an application by the child protection agency to remove children from parental care. The Juvenile Court ordered that the children were to be removed from the custody of the husband and their mother, one of his plural wives, on the basis that the "home of the parents is an immoral environment for the rearing of children" and that the parents had "knowingly failed and neglected to provide for said children the proper maintenance, care, training and education contemplated and required by both law and morals."[22] On appeal, the Utah Supreme Court upheld the decision. Eventually, after the parents agreed to comply with state laws prohibiting polygamy and not to teach their children about polygamy, the children were returned to the care of their parents (Otto 1991). Within two years of the raid, most of the children of Short Creek who had been placed in foster care were allowed to rejoin their mothers and the men were released from prison.

Since the 1950s, there have been occasional prosecutions for polygamy, but as Jerrold Jensen, an Assistant Utah Attorney General, acknowledged, but in theory the state of Utah could prosecute those in polygamous relationships for bigamy, the practice has been to prosecute only if another offence, such as a marriage to an underage girl, is involved (Manson 2005). This is what occurred in one of the most recently prosecuted polygamy cases in Utah. Rower (2004: 720) described Utah prosecutor David Leavitt as being "compelled to initiate charges" against Tom Green, because he had appeared on the television show *Dateline NBC* in 1999, boasting about his several wives and, more importantly, the young age at which they married him. Green was charged and convicted of criminal non-support, statutory rape of a child and four counts of bigamy. Green was convicted on the charge of statutory rape of a child, having been found to have "spiritually married" 13-year-old Linda Kunz in 1985. She conceived a child two months after the "marriage" and two months after the child's birth they married legally to shield Green from charges of child molestation.

Green's appeal of his conviction for bigamy on the grounds that the law violates freedom of religion as guaranteed by the American Constitution was rejected.[23] The Utah Supreme Court noted that, although *Reynolds* was decided more than a century ago, the United States Supreme Court has continued to cite it with approval. The Utah Court also found that the bigamy law would "survive a federal free exercise of religion challenge under the most recent standards enunciated by the United States Supreme Court." Under this test, "a neutral law of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[24] The state is only required to show that the statute is rationally connected to a legitimate government purpose. The Utah Supreme Court found that the object of the bigamy statute was not directed at restricting a religiously motivated practice, that the statute was written in neutral, secular terms and that the state has an interest in the regulation of marriages, as a whole network of laws is based on marriage and the concept of monogamy and a rejection of polygamy, as well as an interest in protecting vulnerable people from abuse and exploitation.

The 2003 United States Supreme Court decision in *Lawrence v. Texas,*[25] dealing with the constitutional protection of intimate sexual contact from state interference, created controversy in the academic literature about whether laws criminalizing polygamy will also be declared unconstitutional.[26] In *Lawrence*, Justice Kennedy held for the majority of the Supreme Court that the Texas "Homosexual Conduct" law was unconstitutional as a violation of the due process clause of the Fourteenth Amendment of the American Constitution. Justice Kennedy held that the constitutionally protected "liberty interest" includes a number of freedoms, including freedom to engage in intimate sexual conduct, and that it protects against "unwarranted government intrusions" into the home.[27] The Supreme Court held that the impugned law sought to control "the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[28]

The Court held that criminalizing this behaviour impacts the dignity of those charged. The Court discussed the history of the laws against sodomy, and the repeal of similar laws in foreign jurisdictions. Justice Kennedy was careful to limit the "liberty interest," emphasizing that the law in question and case before the Court did not involve minors or coercion, and the nature of the consent was not in issue. Since *Lawrence v. Texas*, the Federal Court in Utah has upheld the state's statutory and constitutional anti-polygamy provisions as not violating the United States Constitution.[29]

While American immigration law severely restricts the ability of those practising polygamy to immigrate to the United States and the practice of polygamy is prohibited by criminal law, polygamy is treated less harshly in the context of cases involving the care of children. Michael Otto (1991: 884) observed that recent child custody cases "represent[ing] a marked departure" from the 1955 decision *In re Black*. Although living in a polygamous marriage is clearly regarded as a negative factor when courts are making "best interests of the child" decisions, the practice of polygamy does not automatically preclude a parent from gaining custody or adopting a child.[30]

Section 1182(a)(9)(A) of the *Immigration and Nationality Act*[31] provides that immigrants coming to the United States who practise polygamy are a "class of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States." The United States Immigration and Naturalization Service will not grant a Permanent Resident Card or citizenship to anyone lacking "good moral character" during the statutory period.[32] The determination will be made that an applicant lacks "good moral character" if, among other grounds, the applicant "has practiced or is practicing polygamy." Effectively, an American citizen cannot sponsor the immigration of a spouse in a polygamous marriage (US 2003).

4. LAWS ABOUT POLYGAMY: CANADA

Marriage Law

The issue of capacity to marry is a matter of federal jurisdiction in Canada. For many years this issue was governed by the common law established by the 1866 English decision in *Hyde v. Hyde and Woodmansee*. In that frequently quoted decision, Lord Penzance stated that marriage is "defined as the voluntary union for life of one man and one woman, to the exclusion of all others."[33] In 2000, the federal Parliament enacted the *Modernization of Benefits and Obligations Act*,[34] which confirmed that marriage is "the lawful union of one man and one woman to the exclusion of all others." As well, Bill C-38 (federal), which passed first reading in Parliament in February 2005, provides in s. 2 that: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."[35] So, one cannot enter into a legally valid polygamous marriage in Canada. Further, according to generally accepted principles of Canadian conflict of laws, capacity to marry is governed by the law of a person's domicile (Castel 2002). So if a person domiciled in Canada enters into a polygamous marriage in a country that permits polygamy, that marriage will not be recognized as valid in Canada, and will be regarded as void in most other countries.

Canada's *Criminal Code* Provisions

Unlike some jurisdictions where criminal laws relating to polygamy deal with this practice as an aspect of the offence of bigamy,[36] the *Criminal Code of Canada* distinguishes between bigamy and polygamy. Under s. 290, a person commits bigamy when, being married to another person, he (or she) participates in a marriage ceremony with another person. The polygamy provision, s. 293, is broader as it prohibits not only participation in a polygamous marriage ceremony, but also makes it an offence to enter into "any form of polygamy" or "any kind of conjugal union with more than one person at the same time."

Polygamy has been illegal in Canada since 1892. This provision was enacted in Canada as part of the first *Criminal Code*, apparently as a result of American influences, as criminal laws were being enacted about that time in the United States to prohibit the practice of polygamy by members of the Mormon Church (LRC 1985). Undoubtedly, at the time of enactment, Parliament was heavily influenced by the Judeo-Christian view of marriage as monogamous. A couple of reported prosecutions for polygamy occurred around 1900 against Indians, some of whom had a tradition of practising polygamy. The last reported attempt at using this section was in 1937, when it was held by the Ontario Court of Appeal that a man who left his wife and was living in an adulterous relationship was not committing the offence of polygamy.[37]

Canada's current *Criminal Code*[38] provision criminalizing polygamous marriages is s. 293, which provides:

> s. 293(1) Every one who (*a*) practises or enters into or in any manner agrees or consents to practise or enter into
> (i) any form of polygamy, or

> (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage…is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Section 293(1) applies to "polygamous unions" in which a man is legally married to his first wife, and has taken another "wife" in a religious ceremony that has no legal significance. If a person is charged with polygamy, subs. 293(2) provides that "no…proof of the method by which the alleged relationship was entered into, agreed or consented to is necessary in the indictment or on the trial of the accused." Thus, either the fact of living in a polygamous relationship, or proof that a polygamous ceremony was held, is sufficient for a conviction; there is not need for both.

Though the language differs, s. 293 of the *Criminal Code* is similar to the criminal provisions governing bigamy in such American states as Utah.[39] There, the criminal law prohibiting polygamy refers not only to an individual who is simultaneously married to multiple spouses, but also to a man who is legally married to one woman and *cohabits* with another woman. In *State of Utah v. Green,*[40] the state of Utah was able to convict Tom Green on four counts of bigamy, because the prosecution established that he was in a valid common-law marriage with Linda Kunz, despite the lack of solemnization, and that he was cohabiting with four other women. Despite the difference in precise words, s. 293 would very likely have the same effect in terms of application to Fundamentalist Mormons practising polygamy in Canada. Where any of the "wives" have been taken through a religious ceremony or otherwise become "celestial wives," the relationship will likely be captured by either a "form of polygamy" or a "conjugal union."

Section 293 is broadly worded and would also seem to make it an offence for a Canadian man to go abroad and enter into a polygamous marriage overseas and then return to Canada. Even if he has only one wife in Canada, it would seem that as long as the polygamous marriage subsists, it does not matter that not all of the parties are in Canada. While there are no reported criminal law cases that deal with this situation, this interpretation of s. 293 is supported by statements made in some immigration decisions. [41]

As discussed in Section 2, Fundamentalist Mormons live in polygamous unions in the mountainous interior of British Columbia and Alberta, and there are reported to be at least "a few" Muslims in polygamous marriages in Canada, though any Muslims who are practising polygamy have apparently not been identified by the police. Since Canadian criminal law prohibits polygamy, there have been calls for charges to be laid against the Fundamentalist Mormons who are openly practising polygamy in British Columbia. Although in the early 1990s, sexual assault and sexual abuse charges were laid against a man in Bountiful who had entered into a polygamous marriage with a minor (Committee on Polygamous Issues 1993), there has been no attempt to lay charges under s. 293.

One explanation for the lack of charges of polygamy, despite its open practice in Bountiful, is that police have difficulty getting evidence. The second reason is that the government of British Columbia has expressed a reluctance to prosecute individuals for the offence of polygamy, as there is a concern that the *Criminal Code* prohibitions on polygamy are vulnerable to constitutional challenge (Committee on Polygamous Issues 1993).[42] The federal government, however, is of the view that s. 293 can withstand a constitutional challenge (Committee on Polygamous Issues 1993). As discussed more fully in Section 5, it is also our opinion that the *Criminal Code* s. 293 is constitutionally valid, though it must be acknowledged that ultimately the issue of its constitutional validity can only be resolved by the courts.

Enforcement Issues

Most of the attention paid to polygamous families in Canada has been directed toward Fundamentalist Mormons and, should there be any criminal prosecutions, they are most likely to involve members of that community. However, due to the secrecy surrounding most polygamous families, it may be difficult to collect evidence for a criminal prosecution or even child protection cases. Even those who have left Bountiful are reluctant to discuss the community with the authorities as they have immediate family members still living in that community whom they wish to protect from retribution instigated by other members of the community (Armstrong 2005).

Mohave Country Investigator Gary Engles summarized the reasons for which members of polygamous communities in Arizona are reluctant to come forward with complaints. "The types of retribution that they will receive if they do talk are horrendous.... Number one, their families are taken away from them. Two, their houses are taken away from them. Three, their jobs are taken away from them. And four, and to a lot of people, most important, their salvation is taken away from them" ("Dr. Phil" 2005). Those who leave Fundamentalist Mormon communities are labelled "apostates" and "considered more wicked than mainstream Mormons and non-Mormons" (Armstrong 2005). The possibility of alienation from family and community is very real, and acts as a powerful deterrent to keep individuals from providing evidence for a prosecution against other community members.

A related enforcement problem is that those raised in Fundamentalist Mormon communities are taught from an early age not to trust outsiders, making those who could provide evidence very reluctant to co-operate with police or other persons in authority. This problem is compounded by the manner in which citizens of Bountiful feel they are viewed by outsiders. As an illustration, in an April 2005 newspaper article, a 20-year-old former resident of Bountiful is quoted as stating that he finds that outsiders are "judgmental" when they learn that he was raised in a polygamous community (Armstrong 2005). Current and former members of polygamous communities tend to feel alienated from the broader society, and are unlikely to co-operate with any investigation or prosecution for polygamy.

Evidence is also difficult to obtain, because in some ways polygamy may be described as a "victimless crime," since, at least while they are living in a polygamous union, plural wives usually tell reporters, researchers and the police that it was their decision to enter into a polygamous relationship, and they are generally vehement in stating that they were not coerced into the relationship. While such "wives" are obviously not going to report the "crime" of polygamy, former Fundamentalist Mormon celestial wives may be more willing to testify, though even these women may be very reluctant to testify in court against former husbands.

The difficulties that would arise if evidence were to be collected in anticipation of criminal prosecutions is revealed by what happened when a small group of women, including former plural wives who lived in Bountiful, filed a complaint in 2004 with the British Columbia Human Rights Tribunal that the practice of polygamy violates fundamental human rights. In response, in April 2005 about 80 female residents of Bountiful, organized into a group called The Bountiful Women's Society, held a public meeting, contacting the media to protest they did not believe they were treated unequally in their polygamous marriages, nor were they neglected or "brainwashed" into entering polygamous unions. These women assert that "it is not the Government of British Columbia that has violated our human rights [by failing to intervene to end polygamy], but the continued false accusations of a few self-serving activists, fanned by the frenzy of a story-seeking media, that has violated our constitutionally guaranteed rights of religion, association, privacy and peaceful assembly" (Carmichael 2004). These women voiced their support for "plural marriages." They stated that they benefited from these relationships, by pooling resources and having the opportunity to marry a man who has "proven" himself. They also denied that women are forced to marry against their will (Hutchison 2005). They clearly do not view themselves as "victims."

A related issue is that women who live in a polygamous union are technically just as much in violation of s. 293(1) of the *Criminal Code,* but their prosecution would very likely result in a wave of public support for them, and indirectly for polygamy. Understandably, the few recent prosecutions for polygamy in the United States have only been against men, and the Crown prosecutors in Canada would very likely only prosecute husbands.

Group Sex and Adultery

Both Muslims and Fundamentalist Mormons are generally modest in their dress, and very traditional in their attitudes toward sex, including strong condemnation of adultery and premarital sex. Polygamy as practised by Muslims and Fundamentalist Mormons does not involve group sex; sexual contact is only between the husband and one wife at a time. It is, however, instructive to consider the laws governing group sex and adultery, practices which can in some ways be analogized to polygamy. It should also be noted that there are some polygamous relationships in North America which do not have a religious basis and which may be more likely to involve group sex. The practices of "polyamory" and "polyfidelity," for example, have recently begun to emerge in the United States, though the number of participants is quite small (Strassberg 2003). Unlike traditional polygamous relationships, these unions may involve multiple partners of both sexes, often with different sexualities. If polygamy is legally sanctioned in Canada, it seems probable that more people will form openly polygamous unions not based on any religion and involving group sex.

In 1982, in *R. v. Mason,*[43] the Ontario Provincial Court held that sexual activities involving a small number of persons in a private, non-commercial setting is not an "indecent act" within the meaning of s. 197 of the *Criminal Code*, and acquitted an individual who organized meetings for this purpose in his home on a non-commercial basis. Judge M.A.

Charles found the prevailing community standard to be one of tolerance toward group sex, if done in private.

The issue of consensual group sexual activities that take place in a commercial setting is more controversial. In *R. v. Labaye*,[44] the Quebec Court of Appeal dismissed an appeal of a conviction for keeping a common bawdy-house, concluding that group sex acts at a bar were indecent acts, noting the harm caused by the participants having unprotected sex with many partners and the degradation caused by the voyeuristic activities of many of the club members. Justice Rayle observed that this situation had "nothing…in common with partner-swapping in a private context," clearly implying that such private activities would be legal. In *R. v. Kouri*[45] the Quebec Court of Appeal reversed a lower court decision and acquitted the accused of keeping a common bawdy-house for group sex that also occurred in a bar, albeit in a somewhat different situation from *Labaye*; access to the place was restricted, and it was clear to all in attendance that group sexual activities would occur. Justice Otis held that the sexual acts performed by those who practise "swinging" (couples exchanging sexual partners) do not constitute acts of indecency. Also in *Kouri,* Justice Rochon stated that the location of the acts is an essential component of the test to determine whether an act is "indecent," with the result that "[f]or several decades now the State has disclaimed any right to look into the sexual activity of consenting adults in the privacy of their own homes." He also stated "it appears…that Canadian society tolerates 'swinging' only insofar as these activities take place in private." *Kouri* and *Labaye* have both been appealed to the Supreme Court of Canada, and were argued in April 2005 (Schmitz 2005). While the Supreme Court should clarify the legality of group sexual activities that occur in a setting to which the public may have access, it already seems clear that polyamorists who might engage in group sexual activities in their homes are not committing a crime. Their activities would very likely not qualify as "indecent," as long as they take place in private, between people who are involved in a stable and exclusive relationship. Even more so, the sexual activities of polygamists who engage in sexual acts only between a husband and one wife at a time are not criminal. It is not their sexual activities that are criminal, but their living and child care arrangements.

While some Canadian provinces had pre-Confederation laws making adultery or fornication a crime, for well over a century adultery has not been a crime anywhere in Canada, and in some ways polygamy may be analogized to adultery. Indeed, Mohamed Elmasry, president of the Canadian Islamic Congress, claimed that adultery is more damaging than polygamy for children (Cobb and Harvey 2005). He argued that polygamy, though illegal in Canada, is more "moral" than adultery, since the first wife must consent and because the husband must treat the children of different wives equally. Further, it may be argued that polygamy is a more open and honest arrangement than adultery.

It may, however, be that some of the negative effects generally associated with adultery may also apply to polygamy. It is not uncommon for a polygamist husband to take a second wife without consulting or notifying his first wife, and even if there is apparent "consent," there may be real concerns that the first wife has been coerced into accepting a subsequent wife (Yaqub 2004). Perhaps more significantly from a policy perspective, one of the distinguishing features between polygamy and adultery is that, in a polygamous union, children are an expected part of the relationship. Most polygamous marriages have large numbers of children, while children are rarely the product of adulterous relationships. As discussed in Section 2, polygamy is associated with poor emotional and educational outcomes for children, and children of different wives are often treated unequally.

In Canada, the difference between adultery and polygamy was addressed in the 1937 case of *R. v. Tolhurst and Wright*.[46] The Ontario Court of Appeal distinguished between adultery and polygamy, and found that the *Criminal Code* provision about polygamy (today s. 293) did not apply to adulterers, as the phrase "any kind of conjugal union" does not encompass adultery. Chief Justice Rowell held that, to prosecute for polygamy, there must be "some form of union under the guise of marriage" and living in an adulterous relationship does not constitute the offence of polygamy.

In most circumstances, the difference between adultery and polygamy will be clear, as adulterous relationships are generally sexual, not conjugal, in nature. Adultery is not illegal, because it does not threaten the concept of monogamy, but rather exists within it. Polygamy, in contrast, is illegal, because it violates the concept of monogamy and undermines monogamy (LRC 1985). As American courts have stated in their decisions upholding laws prohibiting polygamy, monogamy is a fundamental concept in their society,[47] as it is in Canada and other western nations. A recognition of the importance of monogamy and gender equality, combined with the growing body of research suggesting that polygamy is associated with negative outcomes for women and children (Hassoueh-Phillips 2001; Al-Krenawi 2001; Al-Krenawi et al. 2002), may also explain why polygamy is illegal, though adultery is not.

Recognition of Foreign Polygamous Marriages – Immigration Issues

The issue of whether Canada will permit individuals involved in polygamous marriages to immigrate to Canada has arisen in a number of reported cases. According to the 1998 case of *Ali v. Canada*,[48] immigration authorities may decide not to permit parties to a polygamous marriage to immigrate to Canada. In that case, the Federal Court of Canada upheld an immigration officer's decision to deny a man's application for permanent residence as there were reasonable grounds to believe the applicant would practise polygamy in Canada, since he was already in a polygamous marriage. The Court concluded that the applicant, whose marriage was valid under the laws of Kuwait, would have had to divorce one of his wives (presumably in Kuwait) to comply with the *Criminal Code* polygamy provisions. The Court held that having two wives constitutes a polygamous marriage, and that it is immaterial whether there is simultaneous cohabitation with both wives at one location.

A year later, a similar decision was rendered in *Awwad v. Minister of Immigration*.[49] A wife in a polygamous marriage whose husband was a resident of Canada applied for permanent residence under the self-employed category. She also applied on humanitarian and compassionate grounds, because her three children were already living in Canada with her husband, together with his first wife and their children. Justice Teitelbaum held that the immigration officer did not err in taking into account her marital relationship as a negative factor. Citing *Ali v. Canada*, Justice Teitelbaum ruled that immigration officers may consider whether the admission to Canada of a party to a bigamous or polygamous marriage would be contrary to the *Immigration Act* and other Canadian laws.

In contrast with the *Ali* and *Awwad* decisions, in 1994 Citizenship and Immigration Canada reportedly gave permission to three American women to stay in Canada permanently, even though each woman was a "wife" of prominent Bountiful polygamist Winston Blackmore (Matas 2002c). Although their applications were at first refused, immigration officials from the national headquarters of Citizenship and Immigration granted permission for the women to stay in Canada permanently. They were not regarded as Family Class immigrants, but were granted permission to stay on "humanitarian and compassionate" grounds as their children with Winston Blackmore were already residing in British Columbia. The apparent discrepancy between this case and the *Awwad* case raises the issue of whether the same standard is being applied to all polygamous potential immigrants.

In 2001, the *Immigration Act*[50] was repealed and replaced by the *Immigration and Refugee Protection Act,*[51] which came into effect in June 2002 (Marrocco and Goslett 2004). Concern was expressed in the media that the new *Immigration and Refugee Protection Act*, and the accompanying regulations might facilitate immigration for the wives of polygamous husbands (Matas 2002c). Under the Regulations of the new Act, however, those in polygamous unions remain excludable. Section 5 of the Regulations provides that a foreign national will not be considered the "spouse" of a person and eligible for Family Class entry if the foreign national was, at the time of marriage, the spouse of another person. As well, subs. 125(1) of the Regulations states:

> s. 125(1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if…
> (*c*) the foreign national is the sponsor's spouse and
> (i) the sponsor or the spouse was, at the time of their marriage, the spouse of another person, or
> (ii) the sponsor has lived separate and apart from the foreign national for at least one year and
> (A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or
> (B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor.[52]

While the provisions under subs. 125(1) appear to be specifically intended to reduce the possibility of polygamous marriages being established in Canada, this is not an absolute bar to entry of polygamous families into Canada. Under subs. 25(1) of the *Immigration and Refugee Protection Act, 2001,* the Minister of Immigration may grant an exemption, on humanitarian and companionate grounds, for a foreign national who is "inadmissible" or "who does not meet the requirements of the Act." In doing so, the Minister is to take into account "the best interests of a child directly affected." Also, all members of a polygamous family may enter Canada together as refugees. Further, some or all of the parties to a polygamous marriage might enter Canada as independent entry immigrants under the

Investor or Skilled Worker classes. And it is also possible for members of a polygamous family to be in Canada illegally, for example by entering as a visitor and overstaying.

Recognition of Foreign Polygamous Marriages – Family and Succession Law

Though in 1866 in *Hyde v. Hyde* Lord Penzance did not recognize a potentially polygamous marriage as valid for the purposes of obtaining a divorce, he also stated that he did "not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions."[53] In Ontario, both the *Family Law Act*[54] and the *Succession Law Reform Act*[55] provide that "the definition of spouse [for the purposes of the Act]…includes a [spouse whose] marriage...is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid." There are, however, no reported cases of these provisions being invoked. Even outside of Ontario, if a dependent wife in a polygamous relationship were to claim spousal support or property relief, there would be good arguments for granting relief to such a vulnerable person in a Canadian court. The claim would be strongest if the woman had married the man in a jurisdiction where the marriage was valid and continued to reside there while the husband resided in Canada.[56]

Case law in Canada gives limited judicial recognition to polygamous marriages in certain contexts, particularly to protect women and children. In *Tse v. Minister of Immigration*,[57] for example, the court found that, if parties to a polygamous marriage enter the relationship in their country of domicile and that country recognizes the marriage as valid, Canada will recognize it as valid for certain purposes. In *Tse,* a polygamous marriage contracted in Hong Kong was held to be valid for the purposes of establishing the legal status of the child.

5. ANALYSIS AND RECOMMENDATIONS: LEGAL AND SOCIAL POLICY ISSUES

Concerns about Polygamy for Women, Children and Society

While there are significant limitations to the existing social science research on polygamy in terms of methodology and sample size, a significant amount of research from a number of countries strongly suggests that, in comparison to monogamy, polygamy is associated with significant negative outcomes for women and children. Polygamous relationships appear significantly more likely than monogamous relationships to be characterized by physical and emotional abuse of women. Many women in polygamous unions experience a diminished sense of self-worth and suffer from competition with the other wives. Children are significantly more likely to have a distant relationship with their father, and to experience academic difficulties.

Polygamy is not, of course, the only type of non-traditional relationship associated with negative outcomes, and some children raised in polygamous families grow up to be emotionally healthy and productive adults. Children raised in step families, for example, are also, on average, more likely to have behavioural and emotional problems than children raised by both of their parents in a monogamous marriage. Unmarried cohabitation is associated with higher rates of spousal violence and relationship breakdown than traditional marriage. Children raised by a lone parent may be more likely to live in poverty than children raised in two-parent families. However, at least in the context of Canada's social and economic structure, polygamy has some unique features that result in negative social, emotional and economic effects for women and children. The problems with polygamy are profound and inherent in the relationship, and are often caused by the polygamous relationship, not merely associated with it.

Polygamy also places an economic burden on modern states like Canada, as the very large families that often result almost inevitably look to the government for support. It is well documented in the United States that since Fundamentalist Mormon men marry only one wife legally, the other "celestial wives" often claim public assistance from the state as single mothers. Some of the largest polygamist families in Colorado City, Utah, reportedly collect over a million dollars in public assistance each year (Rower 2004). Rower reports that 33 percent of Colorado City residents receive food stamps, while the Arizona state average is only 4.7 percent.

As discussed in Section 2, there are well documented concerns about female adolescents and young adults in Fundamentalist Mormon communities in North America being coerced into marrying much older men. Though less well documented, there are also growing concerns about teenage boys being forced to leave these communities with no family support and minimal education. It seems inevitable that, if a modern community not decimated by war is going to widely practise polygamy, significant numbers of males must be forced from the community.

In Canada, there are media reports of young men and boys, some only 14 or 15 years old, who have chosen to leave Bountiful, because they did not wish to participate in polygamous or assigned marriages. While the media reports do not state that the boys were expelled, the boys describe their parents ordering them not to return or to communicate with younger siblings. As well, in some cases, leaving may be pre-emptive. A young male who is a former Bountiful resident, for example, is quoted as stating in an April 2005 newspaper article that he left because "They were going to kick me out anyway" (Armstrong 2005). At the public conference organized by The Bountiful Women's Society in April 2005, women in polygamous unions accused the media of perpetuating the "myths" that boys are forced from Bountiful and that the Bountiful polygamists abuse the welfare system (Hutchison 2005). These reports, however, would not appear to be "myths" but, rather, seem to be the inevitable consequence of polygamy.

There are also serious social concerns if some, usually wealthy or at least powerful, men have multiple wives, forcing men who would otherwise marry to remain single. The Canadian political theorist Tom Flanagan worries about the inequities which polygamy creates *between men in a society*, observing that if polygamy is widely practised, there will be a significant group of men without families, who are likely to be socially disruptive. Flanagan (2001) argued that polygamy produces brutal societies "dominated by a warrior cult of violent masculinity."

Issues Raised by Same-Sex Marriage: Canada

The 1866 English case of *Hyde v. Hyde* stated that "marriage as understood in Christendom, may…be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."[58] That case dealt with the issue of whether the English courts would recognize a potentially polygamous marriage entered into in Utah for the purpose of granting a divorce in England. The definition of marriage articulated in *Hyde* was quoted in Canada for well over a hundred years. In the past few years, however, a series of challenges by gays and lesbians has resulted in a judicial change in that definition. It was accepted in cases like the 2003 Ontario Court of Appeal decision in *Halpern v. Canada (Attorney General)*[59] that the traditional definition of marriage violates the *Canadian Charter of Rights and Freedoms* s. 15 by discriminating on the basis of sexual orientation. This new definition of marriage developed by the courts in cases like *Halpern* is now being recognized in legislation with Bill C-38 (2005) providing that "[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."[60]

In the public debate about same-sex marriage, it has been asserted that changing the definition of marriage to include same-sex marriage may be a "slippery slope" that will result in further challenges to the definition of "marriage" and the courts may force Canadian society to accept polygamy (Coyne 2005; Ward 2005). At the same time as politicians were discussing the relationship between polygamy and same-sex marriage, a survey carried out on behalf of the Vanier Institute of the Family found that 80 percent of Canadians disapprove of polygamy and would not accept it being practised. Though 20 percent stated that they would tolerate it, only four percent personally approve of the practice for themselves or others. In contrast, the survey found that 50 percent of Canadians agree that same-sex couples should be allowed to marry (Bibby 2005).

The debates about same-sex marriage and polygamy are clearly distinguishable. Same-sex marriage does not affect the concept of monogamy. The acceptance of polygamy as a legitimate form of marriage, in contrast, would do away with the concept of monogamy. Since marriage is already structured to involve only two people, the recognition of same-sex marriages will have no economic costs. In contrast, recognizing polygamous marriages would have significant potential ramifications in terms of additional costs to the state, as well as potential costs to employers for pension and insurance plans that provide benefits to the "spouses" of employees.

More significant than the economic issues are the concerns about the social and psychological costs of polygamy for women and children. There is no evidence that same-sex marriage harms children, and much evidence that it benefits those same-sex partners who choose to marry. By way of contrast, as discussed in Section 2, there is a significant body of research from a number of countries about the negative effects of polygamy on children in terms of their emotional development and educational achievement. Polygamy also has significant psychological and emotional costs for women. Furthermore, the fight for same-sex marriage was based on equality arguments, and failure to recognize same-sex marriage was shown to be discrimination on the basis of sexual orientation. Recognition of polygamy would promote gender *in*equality.

While the historical argument that marriage must be monogamous because it is inconsistent with the Christian idea of marriage is no longer persuasive in Canada, there are still strong social and economic policy reasons for rejecting polygamy in this country.

Possible Charter Challenges to Canada's Polygamy Laws

Arguments can be made in Canada about the unconstitutionality of the laws about polygamy. Both the *Criminal Code* s. 293, which creates the offence of polygamy, and the definition of civil marriage, which excludes polygamy, could face a challenge. In any such challenges, the criminal law, which creates a state-imposed penalty, will be subjected to a higher degree of constitutional scrutiny than the civil marriage law, though many of the arguments about the invalidity of these two different types of laws will be similar. The Attorney General of British Columbia has reportedly received a legal opinion that s. 293 of the *Criminal Code* violates the Charter, while the federal Minister of Justice has received opinions that this law is valid. Ultimately, the controversy about the constitutionality of Canada's polygamy laws can only be resolved by the Canadian courts. However, the jurisprudence from every other country that has dealt with the constitutionality of their polygamy laws has uniformly upheld prohibitions on polygamy, and it is our view that these laws are also constitutionally valid in Canada.

A challenge to the *Criminal Code* s. 293 and the civil definition of marriage may be brought under the *Canadian Charter of Rights and Freedoms* s. 15 equality guarantee or under the s.

7 liberty guarantee. However, the strongest arguments in favour of the unconstitutionality of these laws are likely based on the s. 2(a) right to freedom of religion.

Under s. 15 of the Charter, polygamists may argue that the polygamy prohibition is discriminatory. Although parallels have been drawn between polygamy and same-sex marriage, in that they both involve changes to the traditional definition of marriage, sexual orientation has been recognized as a prohibited ground of discrimination, because it is an inherent aspect of a person's identity. In contrast, the practice of polygamy is a particular type of chosen behaviour, one that is prohibited by law. Prohibiting polygamy does not discriminate against an individual based on certain inherent characteristics, but rather proscribes certain behaviour. Additionally, polygamy is inconsistent with the fundamental Charter guarantees of equality of men and women. Polygamy is almost always an unequal relationship, since, as it is invariably practised, men are permitted to marry several women, while women are permitted only one husband. Polygamy conflicts with gender equality as the reality of polygamous relationships is that their inherently patriarchal nature places women in a subordinate position.

Polygamists might also try to argue based on s. 7 of the Charter that their right to "liberty and security of the person" includes the right to live in polygamous relationships without criminal prosecution. American polygamists have already attempted to use the liberty right provided for in the Fourteenth Amendment of the United States Constitution as a basis for arguing that anti-polygamy laws are invalid, though as noted above they have failed.[61] In Canada, polygamists are similarly unlikely to succeed using the liberty argument, as the negative effect polygamy generally has for children will require a balance between the rights of parents and concerns about children as an integral part of the section 7 analysis.

The strongest Charter based freedom of religion arguments are likely to be made by Fundamentalist Mormons in the context of a prosecution under the *Criminal Code* s. 293. Their argument would, for example, be stronger than that of a Muslim facing prosecution under this provision, as the Fundamentalist Mormon faith actually *requires* the practice of polygamy if directed by one of their leaders or "prophets," while Islam only *allows* for the practice of polygamy but does not require it.

It is noteworthy, that courts in the United States,[62] Mauritius[63] and India,[64] as well as the European Human Rights Court,[65] have rejected freedom of religion arguments challenging polygamy laws. Most of these challenges were raised by Muslims, but as discussed, American courts have specifically and recently rejected freedom of religion arguments raised by Fundamentalist Mormons regarding polygamy.

Canadian jurisprudence suggests that while no person shall be compelled to change his or her *beliefs*, the courts will very carefully scrutinize claims under s. 2(a) of the Charter where *religious practices* may be harmful to children. The Supreme Court of Canada in the 1995 case of *B.(R.) v. Children's Aid Society of Metropolitan Toronto*[66] rejected a claim by Jehovah's Witness parents that the Charter was violated by child protection laws that allowed for a court order to be made for their child to have a medically necessary blood transfusion, contrary to the religious beliefs of the parents. Four justices held that freedom of religion should not be interpreted to allow for the right to harm another person. Five justices concluded that the parents' right to freedom of religion was violated, and held that s. 1 is the appropriate provision to balance state and individual interests, concluding that the limits in child welfare on the s. 2(a) parental right to freedom of religion were justified under s. 1 of the Charter, because the protection of children is "a pressing and substantial objective." While the issues raised by polygamy are quite different from those which were before the Supreme Court in *B.(R.)*, that decision demonstrates that concern about the welfare of vulnerable and dependent individuals may outweigh Charter-based rights of adults to freedom of religion.

Rejection of constitutional challenges to Canada's polygamy laws would be consistent with jurisprudence and policies in other free and democratic societies. It would also be consistent with the trend in many societies that had long traditions of unequal treatment of women, but are gradually moving toward recognition of gender equality and the prohibition of polygamy. Conversely the decriminalization or legalization of polygamy would send a very disappointing signal to human rights activists around the world who have been struggling to end the unequal treatment of women in polygamy.

Canada has had a policy of not permitting Family Class sponsorship of immigration for polygamous spouses, and of making it difficult for those in polygamous marriages to immigrate to Canada. If Canada's polygamy laws were ruled unconstitutional, this would almost inevitably require a change in immigration policy. Canada would then be distinguishing itself from other Western countries, making it more attractive to those who practise or who wish to practise polygamy. In particular, Canada would become attractive to Fundamentalist Mormon polygamists as polygamy is likely to continue to be illegal in the United States and a significant Fundamentalist Mormon community is already established in Bountiful (Armstrong 2005). There is already considerable movement between the communities of Bountiful and American polygamist communities, which would undoubtedly dramatically increase if polygamy was removed from the Canadian *Criminal Code*. Further, if Canada were to be the only western country to allow immigration of polygamists, there would probably be significant immigration by polygamous families from Africa and Asia. If polygamy is not illegal, there would certainly be an increase in the number of polygamous family in Canada, with their attendant social and economic costs to Canadian society.

At the international level, there is a clear movement toward the legal abolition of polygamy to promote the interests of women and children. Canada is widely known for its leadership in promoting the rights of women and the recognition of human rights. Canada should be very reluctant to alter this reputation by decriminalizing polygamy.

Recommendations for the Federal Government

1. The *Criminal Code* s. 293, making it an offence to enter into a polygamous marriage or live in a polygamous union in Canada, should be maintained.
2. The constitutional validity of the *Criminal Code* s. 293 can only be decided by the courts. It is, however, important for the federal government to defend this provision in

any litigation, as this law promotes gender equality, and serves to protect women and children.

The Need for Sensitive Enforcement

We believe that Canada's polygamy laws are constitutionally valid, and there continued existence has important symbolic, educational and policy functions. However, aggressive enforcement of the criminal law would not be appropriate, and would be contrary to the interests of the vulnerable women and children who are at present living in polygamous families. Utah Attorney General Mark Shurtleff has noted some of the difficulties in dealing with the much larger Fundamentalist Mormon polygamous community in his state, where the criminal laws against living in polygamous unions are clear and have been held to be constitutionally valid. He observed that dealing with polygamy is not a matter of simply arresting all those who practise it because, if he were to use that approach, 20,000 children in his state would be affected ("Dr. Phil" 2005). While the polygamous communities in Canada are much smaller, a policy of widespread arrests would be devastating for the children of polygamous marriages if it meant that many children would have both parents arrested. Such an aggressive approach would also risk creating a public relations disaster, as occurred in Short Creek, Arizona in 1953.

There are concerns that aggressive investigation and prosecution of polygamy cases might force polygamy further underground, which would make it more difficult to help vulnerable woman and children. Currently, though the Fundamentalist Mormons in Bountiful are private about their affairs, some of them openly admit that they practise polygamy. Arguments have been made that women and children would be better served if polygamy were decriminalized, so polygamous marriages could be better monitored for abuse and exploitation of women and children. Alyssa Rower (2004: 729), an American commentator, has advocated in favour of legalizing polygamy as the most effective way to expose polygamous families to greater scrutiny. She has argued that this would permit, where warranted, prosecution for such criminal activities as child abuse, incest or marriage to an underage "wife." She suggested that legalizing polygamy would mean that "[f]undamentalists could join mainstream society and live under mainstream laws." Even, however, if polygamy were to be decriminalized, polygamists in Fundamentalist Mormon communities are unlikely to become more open and less distrusting of outsiders. As no member of the Fundamentalist Mormon community in Canada has ever been prosecuted for polygamy, it is doubtful that the criminal law has had a major role in causing the community to be secretive.

Aggressive investigation and the enforcement of the *Criminal Code* polygamy provisions through widespread arrests would be problematic, and would jeopardize the welfare of vulnerable women and children. On the other hand, prosecutions are appropriate in cases where minors have been placed in an arranged polygamous union, or where adult women are coming forward to complain of being forced into a polygamous union. Further, it would be appropriate to prosecute the male community leaders who publicly advocate polygamy, live in polygamous unions and have arranged for women to enter into polygamous marriages with other men in their communities.

Assistance, counselling and support should be provided for women and children who wish to leave their polygamous families, but feel trapped because of their limited financial resources and minimal education. Young adult males who wish to leave, or are forced to leave, these communities also need assistance. In some cases this may involve providing legal assistance so civil and family law remedies (including child support) can be pursued.

The British Columbia government should cease funding any independent school that encourages the practice of polygamy. Already in 1993 the Committee on Polygamous Issues was critical of the Ministry of Education's lack of scrutiny of the Bountiful Secondary-Elementary School. It has been reported that the Ministry only evaluates the Bountiful Secondary-Elementary School during pre-announced visits and through the use of standardized tests for which students can be specially prepared by their teachers. The educational standards at the school appear to be inadequate, and because it is controlled by the community's religious leaders, the school is indoctrinating children and isolating them from the broader society. Media reports have been highly critical of this funding, on the grounds that the school is being used to teach polygamy, sexist and racist attitudes, and that it does not prepare students for life outside that specific community (British Columbia Civil Liberties Assocation 2004; CUPE BC 2004; Bains 2003). As polygamy is illegal, government funding should not be provided for independent schools that encourage this practice.

Recommendations to Provincial Governments Where Polygamists Reside

3. Prosecutions for polygamy should take place with sensitivity to the effect of enforcement of the law on the children and vulnerable women.

4. Prosecutions are most appropriate against male community leaders who live in polygamous unions and have arranged for women to enter into polygamous marriages with other men in their communities. Prosecutions for polygamy are appropriate in cases where older men have entered into polygamous unions with minors, or where adult women are coming forward to complain of being in a polygamous union.

5. In the absence of evidence of abuse or neglect, child protection workers and law enforcement officers should not remove children from polygamous families from the care of their mothers.

6. Counselling, support and education should be made available for women, children and young men who want to leave polygamous communities.

7. Child welfare and education laws should be effectively enforced in regard to all children, including those children living in polygamous families.

8. Government funding should not be provided for education that supports polygamy (i.e., the present policy of British Columbia in funding the independent school in Bountiful should be reviewed), and school attendance laws should be enforced to ensure that children of polygamous families receive appropriate education.

Limited Recognition of Polygamous Marriages

Though parties to a polygamous marriage may be excluded from being sponsored to immigrate to Canada under the Family Class of the *Immigration and Refugee Protection Act, 2001,* they have, on occasion been permitted entry on "humanitarian and compassionate" grounds. Though the exact number is unknown, it is also possible that a number of persons living in polygamous unions have gained entry under other grounds or are illegally in Canada.

In Ontario, spouses in polygamous marriages that were validly entered into in foreign countries are given legal recognition for purposes of making statutory claims on death or after separation. This limited recognition of foreign polygamous marriages provides a degree of acceptance for the reality that there are Canadians who are in polygamous marriages, as well as plural wives living in other countries who might make claims against husbands resident in Canada. This provision raises constitutional and political issues about potentially unequal treatment of domestic and foreign polygamous relationships. The provisions of Ontario's *Family Law Act* and *Succession Law Reform Act* can only be used by those whose polygamous marriages were celebrated in a foreign jurisdiction that recognizes polygamy, and is therefore unavailable for the protection of those who enter polygamous marriages in Canada or in another jurisdiction that does not permit polygamy. This could be the basis for an argument by Canadian polygamists that they are denied protection relating to property and spousal support that is available to persons who were party to a polygamous marriage, but who married in a foreign state that recognizes the validity of such marriages. Further, this provision would allow those who entered into polygamous marriages in foreign countries to benefit from a practice that is outlawed by Canada's *Criminal Code.* In our view, however, these differences in treatment are constitutionally and politically justified on the ground that this is consistent with principles of private international law about establishing the validity of a marriage, and it is a fair resolution to the problems inherent in international differences in marriage laws. It is also necessary to protect vulnerable women and children who relied on the laws of the jurisdiction where the polygamous marriage was performed and that likely does not violate the Charter or strengthen claims within Canada to challenge s. 293 of the *Criminal Code.*

Apart from Ontario legislation, statutory schemes that allow claims by "unmarried spouses" (often called "common law spouses" in Canada) for such purposes as family law, succession and such social benefits as the Canada Pension Plan are limited to relationships involving two partners. There may, however, be Charter-based arguments to interpret such laws to recognize limited claims from polygamous wives to protect vulnerable women. These arguments would be more likely to succeed if seen as protecting vulnerable women (i.e., under the equality provisions of s. 15 of the Charter) than if made on the broader basis of recognizing polygamy (i.e., under the religious freedom provisions of s. 2 of the Charter). A woman who could establish that she was coerced to enter and remain in such a relationship would also have a stronger argument. If such arguments are accepted, benefits would presumably have to be divided on a per capita basis to protect all the wives, without imposing unfair burdens on an estate or the government.

There may also be limited circumstances in which a woman who lived in a polygamous union in Canada, such as a Fundamentalist Mormon marriage, can claim certain limited rights arising from the union. One would certainly expect that if a Canadian court had jurisdiction over a case involving a claim to child support by a wife in a polygamous relationship, she would be entitled to succeed, as child support claims do not depend on marriage. Further, property claims that are intended to recognize contributions to the acquisition or maintenance of property without regard to marital status (such as the constructive trust) should succeed; the husband should not be able to rely on the fact that this was an illegal union to deny this type of equitable relief to recognize contributions.

Preventing the formation of any new polygamous relationships is an important goal, but the reality is that there are women and children in Canada living in these relationships, or may be living in other countries and want to make claims against "husbands" in Canada. It is submitted that the American cases that have dealt with issues related to individual children have taken the correct approach. The fact that a mother is living in a polygamous relationship should be viewed as a negative but not determinative factor in making a decision based on the best interests of a child; these decisions require consideration of all the child's circumstances. Limited recognition of polygamous marriages, for example for inheritance purposes, is appropriate, but Canadian law should, in general, not recognize polygamous marriage.

Recommendations to the Federal Government

9. As long as polygamy remains a criminal offence, it should be retained as a basis for excluding immigrants.

Recommendations to the Federal and Provincial Governments and the Courts

10. As there may be refugees and others in Canada who are in polygamous relationships, in appropriate civil cases (e.g., inheritance) the law should offer limited recognition of rights to protect the vulnerable women and children who have lived in polygamous relationships. There may also be vulnerable individuals in polygamous relationships who reside overseas and should be entitled to seek limited relief in Canadian courts against a partner who resides in Canada. A primary concern in deciding how to deal with participants in polygamous unions is that the vulnerable should not be penalized and the innocent should not be stigmatized or revictimized.

Conclusion: The Need for Further Research

At present, there is no justification for changing the Canadian polygamy laws. There are strong public policy arguments against changing the definition of marriage to include a union of more than two individuals. In our view, the present civil and criminal laws prohibiting polygamy are constitutionally valid, as the practice of polygamy has significant negative consequences for women and children, and is contrary to the fundamental Canadian view of marriage as a partnership of equals. Changing the definition of marriage to allow same-sex partners to enter into a monogamous partnership raises very different issues, and should not lead to the legal or social acceptance of polygamy. Although Canadian law and policy should discourage the formation of new polygamous relationships, the reality is that there are women and children in Canada living in these relationships who should not be revictimized by the justice system.

These recommendations must be viewed as tentative, as there is a need for more extensive social science and legal research in Canada about the effects of polygamy on women and on male and female children. As well, more research is required specifically about the different groups that practise polygamy in Canada as the existing research focusses almost exclusively on Fundamentalist Mormons.

Recommendation to the Federal and Provincial Governments

11. There is a need for more research on the nature and extent of polygamy in Canada, including studies on the effects of polygamy on women and children.

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ENDNOTES

[1] *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.D. 130 at 133.

[2] von Struensee (2004: 8). Europe: Cyprus, France, Ireland, Liechtenstein, Portugal, Spain, Switzerland and the United Kingdom; America: Argentina, Canada, Chile, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Peru, Uruguay, Venezuela and the United States; Asia: Bangladesh, Cambodia, China, Nepal, Russia, Singapore, Taiwan, Tajikistan and Vietnam; and Africa: Burundi, Guinea, Ivory Coast, Mauritius, Rwanda, Tunisia and Zaire.

[3] In 1926 Turkish Civil Law was adopted, with polygamy and unilateral divorce of men, as permitted under Sharia law, abolished. Although Turkey has a predominantly Muslim population, it is officially a secular rather than Islamic state. See *Washington Times* (2002).

[4] (1996), 17 B.L.D. 4 (1997), cited in von Struensee (2004).

[5] General Recommendation 21, Equality in Marriage and Family Relations, U.N. CEDAW, 13th Sess., U.N. Doc.A/49/38 (1994).

[6] General Recommendation 21, Equality in Marriage and Family Relations, U.N. CEDAW, 13 th Sess., U.N. Doc.A/49/38 (1994) at para. 13.

[7] General Recommendation 21, Equality in Marriage and Family Relations, U.N. CEDAW, 13 th Sess., U.N. Doc.A/49/38 (1994) at para. 14.

[8] EC, Council Directive 2003/86/Ec of September 22, 2003 On the Right of Family Reunification, [2003] O.J. L. 251/12.

[9] EC, Council Directive 2003/86/Ec of September 22, 2003 On the Right of Family Reunification, [2003] O.J. L. 251/12 at para. 11.

[10] In 1878, the Supreme Court of the United States held in *Reynolds v. United States* (98 U.S. 145 (1878) that the right to religious freedom guaranteed under the First Amendment of the American Constitution was not violated by the law criminalizing bigamy; this decision is still followed in the United States, and very recent decisions have continued to uphold the laws prohibiting polygamy. In 1990, Mauritius' legislation criminalizing polygamy was upheld in *Bhewa v. Gov't. of Mauritius* (1991 LRC (Const) 298, 307 (May 15, 1990), cited by von Struensee 2005), with the Supreme Court of Mauritius holding that the law was constitutional, despite arguments that the right to religious freedom was violated. In *Sarla Mudgal v. Union of India* (1995 (3) SCC 635), the Indian Supreme Court upheld legislation making it an offence for a Hindu husband to enter into a polygamous marriage, even if he converts to Islam.

[11] *Australian Marriage Act 1961* <http://scaleplus.law.gov.au/html/pasteact/0/44/rtf/MarriageAct1961.rtf>. Accessed September 22, 2005.

[12] U.K., Home Office, *Immigration Directorates' Instructions (Chapter 1 Section 8 – Spouses – Annex C)* (London: Home Office, May 2003) at 2. <http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/table_of_contents/chapter_8/annexes_-_a_-_z__.Maincontent.0004.file.tmp/sec1AnnexC.pdf>. Accessed June 1, 2005.

[13] Shah (2003 at 392) quoting Douglas Hurd in HC Debs, vol 122, col 785.

[14] U.K., Home Office, Immigration Rules (London: Home Office, 2005). <http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/immigration_rules.html>. Accessed June 1, 2005.

[15] U.K., Home Office, *Immigration Directorates' Instructions* (Chapter 1 Section 8 – Spouses – Annex C) (London: Home Office, May 2003) at 2. <http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/table_of_contents/chapter_8/annexes_-_a_-_z__.Maincontent.0004.file.tmp/sec1AnnexC.pdf>. Accessed June 1, 2005.

[16] In *Rees v. United Kingdom* (Series A, N.106; [1987] 9 E.H.H.R. 56.), the European Court held that article 12 of the Convention protects the monogamous concept of marriage. In *Janis Khan v. United Kingdom* (No. 11579/85 (1986) 48 D.R. 253, cited by Leech and Young 2001 at 303), the European Human Rights Commission held that article 12 did not require that English law recognize an Islamic marriage that would violate English law, because it involved a 14-year-old girl. Since, under article 12, state parties are not required to recognize marriage celebrated according to religious ceremonies or marriages that contravene a state party's domestic law, the European Court of Human Rights is unlikely to find that polygamous marriages are protected.

[17] EC, Council Directive 2003/86/Ec of September 22, 2003 On the Right of Family Reunification, [2003] O.J. L. 251/12.

[18] *State v. Green*, 2004 UT 76 at paras. 31 and 25.

[19] 98 U.S. 145 (1878).

[20] 98 U.S. 145 (1878) at 167.

[21] *In re Black*, 3 Utah 2d 315 (1953).

[22] *In re Black*, 3 Utah 2d 315 (1953) at 343.

[23] *State v. Green*, 2004 UT 76.

[24] *State v. Green*, 2004 UT 76 at para. 20.

[25] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[26] For arguments that polygamy laws may be found to be unconstitutional following the *Lawrence* decision, see Rower (2004); and Slark (2004). For articles arguing that polygamy laws are constitutional, see Bozzuti (2004) and Ward (2004).

[27] *Lawrence v. Texas*, 539 U.S. 558 (2003) at 562.

[28] *Lawrence v. Texas*, 538 U.S. 558 (2003) at 567.

[29] In the 2005 case of *Bronson v. Swenson* (2005 U.S. Dist. LEXIS 2374), Utah's *Criminal Code* and constitutional provisions prohibiting polygamy were challenged by polygamists on the grounds that these provisions violate the plaintiffs' right to free exercise of their religious beliefs under the First Amendment and right to privacy under the Fourteenth Amendment of the American Constitution. The plaintiffs argued that their religion, Fundamentalist Mormonism, requires the practice of polygamy, and they brought the action after one of them was denied a marriage licence on the grounds that he was already married. Justice Stewart referred to the *Lawrence v. Texas* decision, and concluded that, as the United States Supreme Court had carefully delineated the limitations of its ruling, *Lawrence* cannot be used to require Utah to recognize polygamous marriages as legally valid.

[30] See, for example, *Sanderson v. Tryon*, 739 P.2d 623 (1987); *In re Adoption of W.A.T.*, 808 P.2d 1083 (1991); and *Shepp v. Shepp*, 2003 PA Super 140 (currently being appealed to the Supreme Court of Pennsylvania (*Shepp v. Shepp*, 574 Pa. 656 (2003)).

[31] Sec. 212. [8 U.S.C. 1182].

[32] 8 C.F.R. § 316.10.

[33] *Hyde v. Hyde and Woodmansee*, L.R. 1 P.andD. 130 at para. 3.

[34] S.C. 2000, c-12, s. 1.1.

[35] Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, 1st Sess., 38th Parl., 2005, (as passed first reading February 1, 2005).

[36] There are occasional prosecutions for bigamy in situations where a man has deceived a second woman into believing that he was unmarried at the time of entry into a marriage with her, but in fact had a valid subsisting marriage; see e.g., *R. v. Moore*, [2001] O.J. No. 4513 (Ont. Ct. Just.).

[37] *R. v. Tolhurst; R. v. Wright*, [1937] 3 D.L.R (Ont. C.A.).

[38] R.S.C. 1985, c. C-34.

[39] Utah Code Ann. § 76-7-101(1) (2003) "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person."

[40] 2004 UT 76.

[41] See, for example, *Ali v. Canada* [1998] F.C.J. No.1640.

[42] See also interviews with B.C. Attorney General CBC 2003).

[43] 59 C.C.C. (2d) 461.

[44] [2004] Q.J. No. 7723.

[45] [2004] Q.J. No. 7724.

[46] [1937] 3 D.L.R.

[47] See *Reynolds v. United States*, 98 U.S. 145 (1878); *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).

[48] [1998] F.C.J. No.1640.

[49] *Awwad v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 103.

[50] R.S.C., 1985 c.1-2.

[51] S.C. 2001, c.27.

[52] *Immigration and Refugee Protection Regulations,* S.O.R./2002-227.

[53] Hyde *v. Hyde and Woodmansee*. (1866) L.R. 1 PandP. 130. para. 8.

[54] R.S.O. 1990, chap. F3, s1(b).

[55] R.S.O. 1990, chap. S.26, s. 1(b).

[56] See, for example, *Yew v. British Columbia,* [1924] 1 D.L.R. 1166 (B.C.S.C.), where limited recognition was given to a widow of an actual polygamous marriage. But contrast *Lim v. Lim,* [1948] 2 D.L.R. 353 (B.C.S.C.).

[57] [1983] 2 F.C. 308.

[58] *Hyde v. Hyde and Woodmansee* L.R. 1 P.andD. 130 at para. 3.

[59] [2003] O.J. No. 2268 (C.A.).

[60] Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes,* 1st Sess., 38th Parl., 2005, (as passed first reading February 1, 2005).

[61] *Bronson v. Swenson*, 2005 U.S. Dist. LEXIS 2374.

[62] *Reynolds v. United States*, 98 U.S. 145.

[63] *Bhewa v. Gov't of Mauritius*, 1991 LRC (Const) 298, 307 (15 May 1990), cited by von Struensee (2005).

[64] *Sarla Mudgal v. Union of India*, *All India Reports* 1995 S.C. 1531.

[65] *Janis Khan v. United Kingdom,* No. 11579/85 (1986) 48 D.R. 253, cited by No. 11579/85 (1986) 48 D.R. 253, cited by Leech and Young (2001 at 303).

[66] [1995] 1 S.C.R. 315.

Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada

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ABSTRACT

This report assesses Canada's laws on the recognition of valid foreign polygamous marriages, arguing that the principle of "universality of status" should be given effect. A valid foreign polygamous marriage should be recognized and given effect to the extent that recognition does not violate Canada's essential "public policy." There is a strong association between polygamy and gender inequality, and a fundamental concern is whether either recognizing or failing to recognize valid foreign polygamous marriages would harm women. This report takes the view that the rights of women in valid foreign polygamous marriages should be protected by extending recognition to those marriages. It is the position of this report that recognition would not imply endorsement of polygamy or the gender inequality associated with the practice.

Recognition of valid foreign polygamous marriages raises the issue of how Canadian law should respond to "plural unions" entered into within Canada in some religious communities. The law does not consider such unions to be marriages. They are legal nullities. No civil legal consequences result merely from the fact that the parties went through a religious ceremony. There are, however, criminal consequences. Section 293 of the *Criminal Code* criminalizes polygamy and by its terms applies both to those who enter into a plural union within Canada and to parties to a valid foreign polygamous marriage who "practise" polygamy within Canada. This report examines the history, efficacy and constitutionality of s. 293 of the *Criminal Code* and recommends that this provision be repealed.

Finally, this report considers arguments for and against permitting polygamous marriages to take place under Canada's domestic laws, specifically, the constitutional arguments that could be made. The report recommends that Canada prepare for a constitutional challenge to the limitation of marriage to two persons.

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EXECUTIVE SUMMARY

This report assesses Canada's laws on the recognition of valid foreign polygamous marriages and argues that the principle of "universality of status" should be given effect. A valid foreign polygamous marriage should be recognized and given effect to the extent that recognition does not violate Canada's essential "public policy." There is a strong association between polygamy and gender inequality. A fundamental concern is whether either recognizing or failing to recognize valid foreign polygamous marriages would harm women. This report takes the view that the rights of women in valid foreign polygamous marriages should be protected by extending recognition to those marriages. Recognition would not imply endorsement of polygamy or the gender inequality associated with the practice, but rather would protect the parties in such marriages. The report therefore makes various recommendations on extending further recognition to foreign polygamous marriages.

Recognition of valid foreign polygamous marriages raises the issue of how Canadian law should respond to "plural unions" entered into within Canada in some religious communities. The law does not consider such unions to be marriages. They are legal nullities with no civil legal consequences resulting merely from the fact that the parties went through a religious ceremony. There are, however, criminal consequences. Section 293 of the *Criminal Code* criminalizes polygamy and, by its terms, applies both to those who enter into a plural union within Canada and to parties to a valid foreign polygamous marriage who "practise" polygamy within Canada. This report examines the history, efficacy and constitutionality of s. 293 of the *Criminal Code*. It concludes that the provision may violate the interests and constitutional rights of parties to both valid foreign polygamous marriages and plural unions. The report also concludes that criminalization does not address the harms associated with valid foreign polygamous marriages and with plural unions, in particular the harms to women. The report therefore recommends that this provision be repealed.

Finally, this report considers arguments for and against permitting polygamous marriages to take place under Canada's domestic laws, specifically, the constitutional arguments that could be made. The report does not recommend that Canada amend its civil marriage law to permit polygamy, but it does consider the possibility that the limitation of civil marriage to two persons may be challenged. The report recommends that Canada prepare for a constitutional challenge to the limitation of marriage to two persons.

The report makes the following recommendations.

1. Canadians with connections abroad may wish to marry among family and friends in countries that permit polygamy. However, under the common law, a marriage entered into by a Canadian domiciliary abroad under a law that permits polygamy is void. This common-law rule should be amended to provide that a marriage entered into outside of Canada between parties neither of whom is already married will not be void solely because it took place under a law that permits polygamy and either party is domiciled in Canada. Sections 5-7 of the *Private International Law (Miscellaneous Provisions) Act*

1995, c. 42 (U.K.), set out in Appendix A, provide a model for this recommended law reform.

2. Valid foreign polygamous marriages are not fully recognized under Canadian law. Parties to such marriages, particularly women, are likely to suffer if the legal protections of marriage are not extended to them. Provinces and territories that have not already done so should amend marital property laws, spousal support laws, succession laws and related legislation to include in the definition of "spouse" parties to such a marriage. The legislation should indicate how rights and obligations are to be distributed in the case of an actually polygamous marriage.

3. Parties to a valid foreign polygamous marriage, particularly women, are likely to suffer because they are not able to dissolve their marriage or claim corollary relief under Canada's *Divorce Act*. Canada should amend the *Divorce Act* to include in the definition of "spouse" parties to such a marriage. Other forms of "matrimonial relief" should be extended by statute to parties to valid foreign polygamous marriages.

4. Parties to a valid foreign polygamous marriage, particularly women, are likely to suffer because the public law benefits and burdens of marriage are not fully extended to them. The provinces, territories and federal government should consider amending the definition of "spouse" for the purposes of public law benefits and burdens to include parties to a valid foreign polygamous marriage. The legislation should indicate how benefits and burdens are to be distributed in the case of an actually polygamous marriage.

5. Parties to a valid foreign polygamous marriage that is actually polygamous are not able to immigrate to Canada as an intact family unit. This rule prevents immigration by parties in such marriages or breaks up the family unit so the husband and one wife can immigrate to Canada. The parties most likely to suffer from this rule are the left-behind wives. Permitting immigration by actually polygamous families would indicate toleration, but not endorsement, of the practice of polygamy within Canada. Canada should consider whether the prohibition on immigration by parties to actually polygamous marriages is necessary.

6. Criminalization is not the most effective way of dealing with gender inequality in polygamous and plural union relationships. Furthermore, it may violate the constitutional rights of the parties involved. Canada should repeal the prohibition against polygamy and plural unions in s. 293 of the *Criminal Code*.

7. A constitutional challenge may be brought to the limitation of marriage to two persons. Canada should prepare for such a challenge, including one that may be based on sex discrimination and initiated by women trapped in religious polygamous marriages.

I. INTRODUCTION

This report reviews Canada's laws on the recognition of valid foreign polygamous marriages and assesses whether further recognition of such marriages is warranted. The discussion of foreign polygamous marriages raises the issue of how Canadian law should respond to "plural unions" entered into within Canada in some religious communities. Such arrangements will be referred to as plural unions throughout this report. Although there are no civil legal consequences resulting merely from the fact that the parties went through a religious ceremony, there are criminal consequences. The *Criminal Code* prohibition of polygamy applies both to those who enter into a plural union within Canada and to parties to a foreign polygamous marriage who "practise" polygamy within Canada. This report considers whether criminalization in either case is appropriate and whether the prohibition would withstand a constitutional challenge.

This report emphasizes that neither the recognition of valid foreign polygamous marriages nor decriminalization is an endorsement of polygamy. On the contrary, polygamy is very widely associated with gender inequality and should not be endorsed. However, recommendations in the report on the issues of expanded recognition of foreign polygamous marriage and of decriminalization may be mistaken by some as endorsements of the practice and as support for allowing polygamous marriages to take place in Canada. To address any such misapprehensions, the report considers arguments for and against permitting polygamous marriages to take place under Canada's domestic laws, specifically, the constitutional arguments that could be made. The report does not recommend that Canada permit polygamous marriages to take place in this country, but does recommend that Canada prepare for a possible constitutional challenge to the limitation of marriage to two persons.

What Is a Polygamous Marriage?

Under Canadian law, a polygamous marriage is one that is celebrated under a system of law that permits a party to take more than one spouse at a time.[1] If this requirement is met, a marriage is characterized as polygamous, whether it is "potentially polygamous" or "actually polygamous."[2] If only one spouse is taken, the marriage is potentially polygamous. If more than one spouse is taken, the marriage is actually polygamous. The term "polygamy" comprises both "polyandry," the system under which a woman is married at the same time to two or more men, and "polygyny," the system under which a male is married to more than one woman at a time (Walker 1980: 967-68). Polyandry is rare, but polygyny has been found in many societies (Walker 1980; Mair 1971: 143).

In legal terms, a polygamous marriage can only take place in a country that permits polygamy.[3] A marriage celebrated in Canada according to the relevant provincial marriage act is monogamous. If parties go through a ceremony of marriage in polygamous form in Canada without going through a ceremony in accordance with the relevant provincial marriage act, the marriage is a nullity.[4] This is so regardless of the domicile of the parties.[5] If either party is in an existing marriage, any subsequent marriage celebrated in Canada is a nullity.[6]

The term "polygamy" is also used by some in reference to plural unions that are celebrated by religious communities within countries that do not permit polygamy.[7] Such arrangements are not marriages under Canadian law. They are legal nullities, and no civil legal consequences result from going through such a religious ceremony. This report initially focusses on the issues relating to polygamous marriages as legally defined. Plural unions celebrated within Canada are then included in the discussion of criminal sanctions for polygamy and in the discussion of whether Canada should amend its civil marriage law to allow polygamous marriages.

A potentially polygamous marriage may be converted to a monogamous marriage if the parties adopt a monogamous religion[8] or acquire a domicile in a country whose law requires that marriages be monogamous,[9] or if the place of celebration amends its laws to disallow polygamy.[10] Thus, parties to a potentially polygamous marriage who acquire a Canadian domicile will have their marriage converted automatically to a monogamous marriage. A party acquires a Canadian domicile by taking up residence in Canada with the intention of remaining there permanently or indefinitely.[11]

The Practice of and Reasons for Polygamy

Polygamy was permitted in most parts of the world at one time, but there has been a move away from the practice. Monogamy is now the rule in eastern and western Europe, North America, South America, Central America, Australia, New Zealand and large parts of Asia, including Japan and China.[12] Although India continues to permit Muslims to enter into polygamous marriages, 80 percent of its population is governed by the *Hindu Marriage Act*, which permits only monogamous marriage.[13] In many of the Asian, Middle Eastern and African countries that still permit polygamy, the rules governing the practice have been made more stringent,[14] and actually polygamous marriages are the exception rather than the rule.[15] In Islamic countries, only the wealthier men are able to comply with the Koran's requirement that a man who takes on more than one wife be able to afford each of them and their children equal protection and benefit.[16]

Anthropologists suggest that the reasons for, or functions of, polygamy include the following.

- Increase the probability of children, particularly when a wife is barren or gives birth to female children only.
- Increase the labour supply within a kinship network.
- Deal with the "problem" of surplus women.
- Expand the range of a man's alliances so he is able to maintain or acquire a position of leadership.
- Perhaps provide sexual satisfaction to men, particularly in societies with lengthy post-partum sexual taboos (Macfarlane 1986: 217-221; Mair 1971: 152-153).

Polygamy is also commonly found in closed cultures where open displays of courtship and affection are shunned. As well, polygamy has historically been used in place of divorce in countries with limited grounds for divorce and high thresholds for proving those grounds (Marasinghe 1995: 72-73).

Social scientists have given various theoretical explanations for the practice of polygamy. Alexander,[17] Betzig[18] and MacDonald[19] offered variants of a "male compromise" theory, which explains polygamy as resulting from socio-economic stratifications among men. They argued that monogamy is the result of a compromise among men usually following democratic development, whereby the wealthy, powerful men surrender polygamous practices and multiple wives in exchange for political support from poor men. The male compromise theory is based on Richard Alexander's theory that nation-states impose monogamy on their male citizens to equalize their reproductive opportunities.

Kanazawa and Still (1999) argued for a "female choice" theory of marriage practices, which posits that women are in the position of demanding a particular marriage form based on the availability and status of men. Where resource inequalities are great among men, women will choose to marry polygamously. Where inequalities are comparatively low, women will chose to marry monogamously. This theory is female-empowering and functional. It recognizes polygamy or monogamy as rational choices to be made in accordance with social determinants, such as resource inequality. However, it has been criticized for failing to account for the political reality that undermines this choice. In addition, the politics of inequity underlying the practice of polygamy (where there are child brides, for example) are often misattributed to the institution of polygamy. Morrison and Jutting (2004: 16) wrote: "Polygamy entails inequality between men and women because usually there is a difference of 20 to 30 years between the second (or third) wife and her husband."

Sanderson argued that polygamy is really about male choice and preference for sexual variety to ensure male reproductive success. The extent of the opportunity to seek sexual variety may vary, however, with social circumstances, such as the degree to which women are available and how costly they are as wives (their economic value). Sanderson observed that "[p]oorly educated women from rural areas and with low socioeconomic status are much more likely to be in a polygamous marriage, and well-educated women from higher socioeconomic backgrounds, who have many more marital options, shun polygamy."[20] The author rejected the female choice theory and noted that it is mostly high-status men in polygamous societies who have multiple wives, as they have "the means to acquire them and the personality traits (e.g., competitiveness, aggressiveness) that incline them toward the pursuit of several females. High status males mate more often and leave more offspring, a pattern that is found widely throughout mammalian species."[21]

Sanderson embraced this socio-biological understanding of polygamy and supported Alexander's male compromise theory,[22] which relies on the idea of reproductive opportunity levelling. Sanderson, drawing on empirical data to support Alexander's theory, wrote: "Male competition for wives produces conflict, and societies that recruit large numbers of young men in order to conduct wars with other societies must find a way to minimize this sort of conflict…[which] can be accomplished by legally prohibiting polygamy, thus giving all males equal access to wives" (Sanderson 2001: 332). According to Alexander, this socially imposed monogamy is a by-product of the large nation state. Sanderson drew on empirical data to support Alexander's theory.

> [Forty-six percent] of larger states have socially imposed monogamy, compared to 26% of smaller states, 10% of chiefdoms, and 11% of bands and tribes. In the full *Ethnographic Atlas* (1,267 societies rather than 186), 46% of larger states have monogamy and another 39% have only occasional polygamy (Murdock and White 1969).

Michael Price's hypothesis that monogamy supports co-operation and, as a result, has spread from the West to other regions was tested by using five measures of societal success against 156 contemporary nation-states, of which 84 are monogamous and 72 are polygamous. Among other conclusions, "Price found that 64% of monogamous societies but only 25% of polygamous societies had liberal democracies."[23] But not all monogamy is politically imposed, as evinced by its existence among small-scale band and tribal societies. "Ecologically imposed monogamy" arises when men lack the resources needed to support multiple wives (Sanderson 2001: 333).

Bretschneider (1995) suggested that polygamy is a multi-dimensional phenomenon. He argued that it is not possible to isolate socio-cultural, economic, demographic or environmental conditions as singular causes. Rather, access and control over resources, as well as the mobility of women across borders, are significant influences.

The research is not conclusive on the impact on children of growing up in polygamous families. In 2002, researchers conducted a review of all quantitative and qualitative studies that had been done on the effect of polygamy on children's outcomes (Elbedour et al. 2002). They found that children of actually polygamous marriages were at greater risk of experiencing marital conflict, family violence and family disruptions, marital distress, particularly that related to high levels of unhappiness of women in polygamous unions, absence of the father and financial stress. However, some of the studies reviewed found that children, particularly older children in a family, demonstrated resilience in dealing with these risk factors. The researchers concluded that cultural factors play a role in determining the extent to which the risk factors associated with polygamy negatively affect children. The researchers suggested that a culture in which polygamy is not only tolerated but valued, where the larger family size associated with polygamy is a signifier of social status, and where women are respected for their role in producing children, may help children deal better with the risk factors associated with polygamy.

Polygamy has long been associated with gender inequality by Western commentators,[24] and this remains the case. In particular, the United Nations has consistently taken the position that polygamy contravenes women's equality rights. The U.N. Committee on the Elimination of Discrimination against Women, which monitors compliance of states parties to the Convention, issued a general recommendation in 1992 that included the following.

> Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.[25]

Social scientists who have closely studied the condition of women in societies that practise polygamy support the conclusions of the United Nations. In one study of and by Sudanese women, the researchers concluded:

> Women do not like polygamy but cannot do anything about it. Divorce is the *de facto* right of men in the Sudan, whatever the behaviour of the husband. Only one of the respondents tried to gain a divorce from her husband and she could not make the legal system work in her favour and so gave up. Men can and do divorce women when they want too, although this was comparatively rare among our interviewees. The fact that men can take another wife or divorce their existing wife is a source of insecurity and anxiety for women and helps to ensure their adherence to conservative social norms in areas like reproduction, circumcision, work, etc. (Mukhopadhyay et al. 2001: 4).

Social scientists studying various societies often reiterate that the practice of polygyny leads to women being oppressed, threatened or disempowered.[26]

The decline in polygamy has been related to changing social conditions, the increase in democracy, the decline in arranged marriages, the increase in companionate marriage[27] and the improvement in the education of and human rights protections for women. Polygamy may offer short-term benefits to women in societies where women have generally low education levels and few economic opportunities and where their status is linked to marriage and childbirth. However, the consensus is that polygyny can flourish only in the context of gender inequality. This is not to say that all women experience polygyny as exploitative or undesirable,[28] only that the practice is connected with gender inequality by organizations such as the United Nations and most social scientists.

II. SHOULD CANADA EXTEND FURTHER RECOGNITION TO FOREIGN POLYGAMOUS MARRIAGES?

An issue facing Canada is whether further recognition should be extended to valid foreign polygamous marriages. This question must be considered in light of the multicultural nature of Canadian society, the rights and freedoms in the *Canadian Charter of Rights and Freedoms*, and the potential for harm to women of refusing to extend recognition to marriages into which they legally entered in their countries of origin. But the potential harm to women in extending further recognition to polygamous marriages must also be considered. Currie (1994: para. 3.1.3) expressed concern that further recognition may somehow "legitimize" polygamous marriages.

> Recognizing existing polygamous marriages of immigrants and providing spouses with the benefits and entitlements normally available to spouses defined by Canadian law is an outstanding issue. A legal analysis should be carried out to determine if providing these benefits and entitlements would have the effect of legitimizing polygamous marriages through indirect means. If so, other normal mechanisms to provide assistance to women in polygamous marriages or women who leave polygamous marriages should be assured.

In considering this issue, it is important to keep in mind that most of the incidents of marriage have been extended to unmarried couples, generally on the basis of cohabitation for a certain period.[29] In addition, the status of children is no longer affected by the marital status of the parents.[30] Therefore, the legal significance of marital status has declined substantially in Canada. Failure to recognize a foreign marriage will not affect issues relating to children of that relationship under Canadian law. And some of the incidents of marriage may be extended to the parties pursuant to the statutory expansion of the definition of "spouse" to include unmarried cohabitants.

Validity of Foreign Marriages

Under Canadian law, a foreign marriage is valid if it is formally valid under the law of the place of celebration and essentially valid under the law of each party's prenuptial domicile.[31] "Formal validity" refers to such matters as obtaining a licence and having witnesses. Under Canada's conflict of laws rules, the issue of whether the formal requirements of marriage have been met is governed by the law of the place of celebration. "Essential validity" refers to the capacity of a party to marry. A party lacks the capacity to marry if he or she is in a prior existing marriage, is within the prohibited degrees of relationship with the other party, is below the age of marriage, lacks mental capacity, does not consent, or is unable to consummate the relationship (Hahlo 1972: 654). Under Canada's conflict of laws rules, the issue of whether a party had capacity to marry is governed by the law of the party's domicile. The rules governing capacity to marry vary from jurisdiction to jurisdiction, but generally the principle of "universality" is applied to status, that is, a status validly acquired under a party's personal law will be recognized everywhere (Graveson 1953: 118-119).

It is possible to refuse recognition to a foreign marriage on the ground of public policy, but this discretion is rarely exercised.[32] "Public policy" in the private international law context is construed very narrowly. There is no blanket prohibition against the recognition of foreign polygamous marriages on public policy grounds. On the contrary, they are recognized for many purposes. "[P]olygamous marriages valid in the country where they were entered into and where the parties were domiciled would be recognized as valid by Canadian Courts."[33] Blom (2003: 382-383) explained the apparent anomaly between the public policy against permitting polygamy on one hand and the application of the universality principle to polygamous marriage on the other.

> A polygamous marriage cannot be entered into in England, and the laws that say so can be described as founded on public policy in the private international law sense. However, English law has long regarded parties who were validly, albeit polygamously, married elsewhere as being legal spouses in England for the purposes of remarriage, spousal support obligations, the legitimacy of children, and succession. The fact that the marriage took place in another country is obviously part of the reason why public policy does not intervene here, but so are the very different issues presented by these cases. The question is not as to the parties' ability to marry but as to the consequences of a marriage that has taken place. Protecting the interests of family members is a value shared by English and by the foreign law, and outweighs whatever anomaly is produced in the domestic legal system by recognizing a polygamous union as a marriage.

Common-law countries have long adopted the principle that a polygamous marriage valid by the law of the place of celebration and by each party's personal law will be recognized for many purposes even if the marriage is actually polygamous.[34]

A foreign polygamous marriage is valid if it is formally valid under the law of the place of celebration and if each party had capacity to enter into the marriage under the law of his or her prenuptial domicile.[35] If a party domiciled in a country that permits polygamy enters into a polygamous marriage, that marriage will be valid, provided all the other requirements of a valid marriage are met. On the other hand, a person who is domiciled in Canada does not have capacity to enter into a polygamous marriage. Thus, if a Canadian domiciliary enters into a polygamous marriage in a country that permits polygamy, that marriage will be an invalid polygamous marriage.[36] This common-law rule was changed by statute in the United Kingdom.[37]

The argument for changing the common-law rule was put forward over three decades ago.

> The situation in which the rule is most likely to apply is where an immigrant from a polygamous country acquires a domicile in England and then decides to marry. Sociologically it is quite likely that such a person might want to marry a woman from his home country and he might return there on a visit and marry her there under the local law. (It will normally be necessary for

> the marriage to take place abroad since the woman might not otherwise be admitted to this country.) If the local form was polygamous the marriage would be void under the rule. This would be very unfortunate because the parties would have no reasons to doubt the validity of their marriage. …
> In *Ali v. Ali* it was held that where parties contract a valid potentially polygamous marriage before acquiring a domicile in England, the marriage is converted to a monogamous one once a domicile in a monogamous country is acquired. If this rule is applied to the situation where the parties are domiciled in England before the celebration of the marriage one comes up with a solution which respects English social policy without doing violence to the reasonable expectations of the parties: the marriage is valid but is instantaneously converted into monogamous form (Hartley 1971: 305).

The U.K. statute, excerpted in Appendix A, provides that a marriage entered into in a country that permits polygamy by a previously unmarried U.K. domiciliary is not, for that reason alone, void. The statute does not permit U.K. domiciliaries to enter into actually polygamous marriages abroad. But it does modify the choice of law rule in relation to the essential validity of potentially polygamous marriages entered into by U.K. domiciliaries. Canadian domiciliaries may wish to marry among friends and family in countries and under laws that permit polygamy. Provided that such marriages are not actually polygamous and otherwise meet the requirements of a valid marriage, they should be recognized. It could be provided that such marriages would then become monogamous when the parties acquired a domicile in a monogamous country.

Recommendation 1: Canadians with connections abroad may wish to marry among family and friends in countries that permit polygamy. However, under the common law a marriage entered into by a Canadian domiciliary abroad under a law that permits polygamy is void. This common-law rule should be amended to provide that a marriage entered into outside of Canada between parties neither of whom is already married will not be void solely because it took place under a law that permits polygamy and either party is domiciled in Canada. A model for this recommended law reform is ss. 5-7 of the *Private International Law (Miscellaneous Provisions) Act 1995*, c. 42 (U.K.), set out in Appendix A.

Status Versus Incidents of Status

A valid foreign marriage is not necessarily recognized for all purposes. "Acceptance of the principle of recognition of status does not of itself imply that all the incidents of that status will be recognized" (Graveson 1953: 103). It is important in this regard to distinguish between "status" and "the incidents of status." Graveson (1953: 2) defined status as:

> a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern.

Marriage confers spousal status and the incidents of marriage. These "incidents" are the "special rights, duties, privileges or incapacities"[38] that flow from the status of marriage. The incidents of marriage are numerous. For example, a person who is validly married and then goes through a form of marriage with a third party may be charged with bigamy.[39] A party to a valid subsisting marriage lacks the capacity to marry.[40] A person must be married in order to obtain a divorce.[41] Spousal status confers relational rights and obligations as well, such as the right to claim and the liability to pay support.[42]

Applying the principle of universality of status, a marital status validly created under a foreign system of law is recognized in Canada. The incidents of marriage are extended to those in a valid foreign marriage unless there are compelling reasons to refuse recognition for specific purposes. In the 1866 decision in *Hyde v. Hyde and Woodmansee*,[43] the English court ruled that it did not have jurisdiction to grant a divorce in the case of a polygamous marriage. However, the court expressly limited its decision to the issue of jurisdiction to grant a divorce and anticipated that some incidents of marriage might be extended to polygamous marriages, specifically mentioning "rights of succession or legitimacy" and "rights and obligations in relation to third persons."[44] The limited scope of the *Hyde v. Hyde* decision has been recognized and acted on by courts, particularly since the 1930s.

Recognition of Valid Foreign Polygamous Marriages

Common-law rules and statutory amendments in some provinces and territories have extended recognition to valid foreign polygamous marriages for many purposes. However, the principle of universality of status has not been applied fully. Failure to give full recognition to valid foreign polygamous marriages means that parties to such a marriage will not have access to the benefits and protections of marriage. Women in such marriages are particularly likely to need the benefits and protections of marriage and to suffer if their marriages are not recognized. Areas in which recognition has been extended and those in which further reform is recommended are discussed below.

The number of polygamous marriages that will raise the issue of recognition is presumably very small. This is because of the principle that a potentially polygamous marriage becomes a monogamous marriage if the parties acquire a domicile that prohibits polygamy or adopt a religion that prohibits polygamy. Thus, the potentially polygamous marriage of parties who immigrate to Canada and acquire Canada as a domicile will be considered monogamous.

But parties to a potentially polygamous marriage who are in Canada as immigrants or as temporary residents or visitors and who do not acquire Canada as a domicile will not have their marriage converted to a monogamous marriage. As for parties to actually polygamous marriages, they would not be permitted to immigrate to Canada as a complete family unit, as discussed below, but if the husband and one wife immigrated to Canada, recognition of the marriage could become an issue. Included in the issues raised in this context would be the rights of the left-behind wife. As well, all the parties to an actually polygamous marriage could have immigrated to Canada under false pretences. Or parties to an actually polygamous marriage could be in Canada as temporary residents or visitors. There are a variety of circumstances, then, in which the claims of parties to a valid foreign polygamous marriage could arise in Canada.

Succession Rights

Both *Lim v. Lim*[45] and *Yew v. Attorney-General of British Columbia*[46] involved a husband and two wives who entered into a polygamous marriage in a foreign country that permitted polygamy at the time. The court recognized the actually polygamous marriage for the purposes of succession.

Spousal Support Rights and Obligations

In *Lim v. Lim*, the court ruled, reluctantly, that a second wife was not a "wife" for the purposes of claiming spousal support.[47] The court also commented on the inconsistency in recognizing an actually polygamous marriage for the purposes of succession, as was done in the *Yew* case, and at the same time refusing to do so for the purposes of spousal support. However, the court distinguished the two situations, stating that it was bound by *Hyde v. Hyde* to refuse recognition of the marriage "where the party seeks to enforce a remedy to which, under our law a wife is entitled by reason of the marriage contract, and arising out of the marriage contract."[48]

In a later Ontario case, a woman who entered into a potentially polygamous marriage was ruled to be a "wife" within the meaning of Ontario's *Deserted Wives' and Children's Maintenance Act*, and was thus eligible for spousal support.[49] This ruling was made on the grounds that the potentially polygamous marriage had become a monogamous marriage. However, Cory J., as he then was, suggested that it was unnecessary to follow *Hyde v. Hyde* when the result would be "tragic and inequitable" as in the earlier *Lim v. Lim* case. The point stressed in this case is that it would be inequitable to invoke dated precedent to deny support to an economically dependent wife.

Ontario, Yukon, Prince Edward Island and the Northwest Territories include in the statutory definition of "spouse" for the purpose of spousal support a party to an actually or potentially polygamous marriage.[50] Other provinces and territories should do the same to ensure that parties who have legally entered into marriages in their home countries are not denied support. The potential unfairness of denying support to those who are economically dependent should be addressed.

It should also be noted that parties to polygamous marriages may be entitled to spousal support on the basis of cohabitation. The provinces (except Quebec) and the territories extend spousal support rights and obligations to parties who have cohabited for a certain period.[51] However, most of the relevant statutes apparently limit the application of these rights and obligations to cohabiting couples. Therefore they could probably apply to parties in potentially polygamous marriages only. There is no case law on the application of the statutes to parties in either potentially or actually polygamous marriages.

Marital Property Division

For the purpose of marital property division, Ontario, Yukon, Prince Edward Island and the Northwest Territories include in the statutory definition of "spouse," a party to an actually or potentially polygamous marriage.[52] In Ontario, this definition of spouse was first adopted in the 1978 *Family Law Reform Act*. A review of the Ontario Law Reform Commission reports leading to the 1978 legislation and of the debates in the Ontario Legislature on the measure reveals no discussion of this issue.[53] There is no indication in either source, in the Act itself or in the current legislation as to how the marital property regime should be applied to an actually polygamous marriage. The same is true in regard to the other jurisdictions. There is no case law dealing with the application of the 1978 or Ontario's current *Family Law Act* or the statutes of Yukon, Prince Edward Island or the Northwest Territories to polygamous marriages.

It should also be noted that parties to polygamous marriages may be entitled to a share of property on the basis of cohabitation in some provinces. Saskatchewan and Manitoba extend marital property rights and obligations to cohabitants.[54] However, the statutes of these two provinces apparently limit the application of these rights and obligations to cohabiting couples. Therefore, they could probably apply to parties in potentially polygamous marriages only. There is no case law on the application of the statutes to parties in either potentially or actually polygamous marriages.

Apart from any potential claim under family property statutes, parties may be able to obtain a share of property or money damages on the basis of "unjust enrichment." To succeed, the claimant must show that the other party has been enriched, that the claimant has suffered a corresponding deprivation, and that there is no juristic reason for the enrichment.[55] Such a claim may be brought in the context of unmarried cohabitation.[56] A successful claim of unjust enrichment was brought against a respondent who had more than one conjugal partner.[57] This precedent could be used to support the claim of a party to an actually polygamous marriage. However, it would be potentially harmful to leave women in valid foreign polygamous marriages to the uncertainties of claims based on unjust enrichment. Women are more likely to be the party asserting a claim to a share of marital property. Excluding parties to a valid foreign polygamous marriage from provincial martial property schemes is likely to have a disproportionately negative impact on women.

Recommendation 2: Valid foreign polygamous marriages are not fully recognized under Canadian law. Parties to such marriages, particularly women, are likely to suffer if the legal protections of marriage are not extended to them. Provinces and territories that have not already done so should amend marital property laws, spousal support laws, succession laws and related legislation to include in the definition of "spouse" parties to such a marriage. The legislation should indicate how rights and obligations are to be distributed in the case of an actually polygamous marriage.

Divorce and Annulment

Parties to a polygamous marriage may not obtain a divorce under Canada's *Divorce Act*,[58] regardless of whether the divorce is actually or potentially polygamous. The refusal to grant a divorce to those in a polygamous marriage is based on the 1866 decision in *Hyde v. Hyde and Woodmansee*.[59] The petitioner in that case had entered into a potentially polygamous marriage in Utah and later sought a divorce in England. The court dismissed the claim, reasoning that the English divorce statute was designed for monogamous marriages only, as evinced, for example, by the fact that it provided for divorce on grounds of adultery.

Canada's *Divorce Act* no longer provides that adultery is grounds for divorce, but under s. 8 of the Act adultery is one way of proving marriage breakdown, currently the sole ground of divorce. Whether the "technical problems" of applying the *Divorce Act* to a polygamous marriage are insuperable has long been questioned. The U.K. Law Commission recommended that parties to a polygamous marriage be entitled to apply for a divorce in England, provided the jurisdictional requirements were met, if the party seeking a divorce had grounds other than adultery.[60] Mendes da Costa (1966: 335) argued that "there may be no good reason why, applying established choice of law rules, regard should not be had to the *fact* of polygamy in the *interpretation* of such grounds." Mendes da Costa's argument has even more force today. The term "adultery" in the *Divorce Act* traditionally has been interpreted as voluntary sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage.[61] Because civil marriage has now been opened up to same-sex couples, the term "adultery" in the *Divorce Act* must now be reinterpreted accordingly.[62] There would seem to be no insurmountable problem in doing the same in regard to polygamous marriages.

In addition to divorce, other forms of "matrimonial relief," that is, annulment, judicial separation or decree of presumption of death, may be unavailable to parties to a polygamous marriage under the authority of *Hyde*. Provided the other requirements for the exercise of jurisdiction are met, there seems to be no reason for refusing this relief in the case of valid foreign polygamous marriages.

Recommendation 3: Parties to a valid foreign polygamous marriage, particularly women, are likely to suffer, because they are not able to dissolve their marriage or claim corollary relief under Canada's *Divorce Act*. Canada should amend the *Divorce Act* to include in the definition of "spouse" parties to such a marriage. Other forms of "matrimonial relief" should be extended by statute to parties to valid foreign polygamous marriages.

Public Law Benefits and Burdens

A party to an actually polygamous marriage could be included in the definition of "spouse" for the purpose of public law benefits and burdens. Statutory authority to extend benefits and burdens to such parties would be required. The English Court of Appeal ruled that the statutory inclusion of parties to an actually polygamous marriage for the purpose of a government pension for widows did not mean that the same was true in regard to a widowed mother's allowance under the *Social Security Contributions and Benefits Act 1992*, which did not include parties to a polygamous marriage in its scheme.[63]

One model for extending public law benefits and burdens to those in polygamous marriages may be found in English legislation. For example, *The Tax Credits (Polygamous Marriages) Regulations*, excerpted in Appendix A, allocate the individual element of the child tax credit to a child's "main carer" and the family element among members of a polygamous "unit" on a pro rata basis.[64]

Another source of models for public benefits in the case of actually polygamous marriages is the U.K. Law Commission's 1968 report, which canvassed the range of possibilities for allocating social security payments.

> a) Contributors with more than one wife should be required to pay an increased contribution, and social security benefits should be payable to each of the wives in full. …
> b) Contributors with more than one wife should be required to pay the same contribution as everyone else, but social security benefits should be payable to each of the wives in full. …
> c) The social security benefits that would have been payable to one wife should be equally divided between all the wives of a polygamous marriage. ...
> d) If there is one wife living in England and another (or others) living e.g. in Pakistan, the social security benefits should be payable to the former but not to the latter. …
> e) The Ministry of Social Security might be given a discretionary power to select the wife to whom the benefits should be paid. …
> f) The husband might be given power to nominate the wife to whom the benefits should be paid, either by a signed writing or by his will. (UK Law Commission 1968).

Each possibility was considered problematic to some degree by the Law Commission. Option (c) was considered to possibly "spread the butter too thin," in the sense that it might result in inadequate support for each wife. However, it may be the most tenable solution for some purposes, and it is apparently the approach taken by the United Nations in regard to employee benefits (Lynch 2004: A15).

Recommendation 4: Parties to a valid foreign polygamous marriage, particularly women, are likely to suffer because the public law benefits and burdens of marriage are not fully extended to them. The provinces, territories and federal government should consider amending the definition of "spouse" for the purposes of public law benefits and burdens to include parties to a valid foreign polygamous marriage. The legislation should indicate how benefits and burdens are to be distributed in the case of an actually polygamous marriage.

Immigration

Parties to an actually polygamous marriage are not entitled to permanent resident status as a family unit in Canada, because of the possibility that they would practise polygamy in this country in violation of the *Criminal Code*.[67] This is consistent with current policy of other western countries.[68]

Two recent immigration cases highlight the current approach of Canadian courts to actually polygamous marriages. In *Ali v. Canada (Minister of Citizenship & Immigration)*,[69] Mr. Ali was denied entry into Canada. The immigration officer asserted that there were reasonable grounds to believe that Mr. Ali would practise polygamy in Canada, which was prohibited by the now-repealed *Immigration Act*[70] and, of course, by the *Criminal Code*. In fact, the manual for immigration officers instructed them to turn away potential immigrants if the officers suspected they would practise polygamy in Canada (CIC nd). Mr. Ali, a Palestinian, had two wives he had married in Kuwait. At the judicial review, Mr. Ali submitted that he would not be practising polygamy in Canada, because each wife would have a separate residence in a different province.

Justice Rothstein applied the two-step test for validity of foreign marriage as set out in *Tse*, and found that this was a valid polygamous marriage. Nonetheless, the immigration officer's determination stood, as Justice Rothstein held that despite the separate residences of the wives, the parties would still be practising polygamy, contrary to Canadian public policy.

In *Awwad v. Canada (Minister of Citizenship & Immigration)*,[69] another case of judicial review of the decision of an immigration officer, the applicant was the second wife in a polygamous marriage and mother of three children living with the husband and first wife. She argued that the immigration officer should not have taken into account her marital status in denying her application for permanent residence.

The judge found that children are a relevant issue for an application based on humanitarian and compassionate grounds, as this was, so there was no error on the part of the immigration officer. Furthermore, citing *Ali*, the judge stated: "as a general proposition, a visa officer may consider whether the admission to Canada of parties to a bigamous or polygamous marriage would be contrary to the *Immigration Act* and the law of Canada."[70]

The arguments for prohibiting immigration by parties to an actually polygamous marriage are that such marriages are inconsistent with prevailing social values and are likely to give rise to social problems. These were the explicit reasons for France's 1993 immigration law reform.

> The rise in African immigration in the '90s increased the incidence of polygamy in France even though it is regressing in that continent's urban areas. This social and economic system is incompatible however with the principles of equality and individual freedom fundamental to the French society. According to the 24 August 1993 law, a foreign resident living in polygamy cannot be granted or renew a residency document. Women as well as children of polygamous families in France meet with many difficulties: women's lack of control of their living space, promiscuity, isolation and financial dependence of the female spouses exacerbating their competition, which in turn encourages natality, degradation of the relationship between the children and the female spouses (EC 2004: 10).

It may also be argued that allowing immigration by all the parties to an actually polygamous marriage would operate as an endorsement of the practice of polygamy. It would at least indicate that such marriages could be accommodated within Canadian society. Although immigration by parties to actually polygamous marriages would probably be very limited, the existence of such marriages within Canada may be "the thin edge of the wedge" that could be exploited by anyone advocating legalization of polygamous marriage within Canada.

On the other hand, it could be argued that opening immigration to those in actually polygamous marriages would not be an endorsement of polygamy at all but only an instance of comity and application of the principle of universality in regard to personal status. In addition, the hardship of left-behind wives, the issue that arose in the *Awwad* case, should be considered. Immigration policy should not further harm women who may already suffer disadvantages from being in a polygamous marriage. Any change in immigration policy could be coupled with an explicit and clearly enunciated policy against polygamy. The United Nations consistently advocates the elimination of polygamy but at the same time recognizes polygamous marriages for the purposes of its employee benefits program (Lynch 2004). Similarly, Canada could denounce the practice of polygamy while at the same time recognizing that civilized countries do permit the practice. The issue of family status for the purposes of immigration is not a question of whether polygamy should be permitted but rather "the consequences of a marriage that has taken place" (Blom 2003: 382-383).

It could also be argued that there would be a strategic advantage to permitting immigration by those in actually polygamous marriages. Canada has been increasingly active in the global competition for highly skilled immigrants (Dauvergne 2003; Harris 2004). Opening immigration to those in actually polygamous marriages would presumably expand the pool of applicants for immigration to Canada. It may also signal an adherence to religious tolerance and multiculturalism that is attractive to potential immigrants, whether or not they are parties to actually polygamous marriages.

Canada welcomes over 200,000 new permanent residents each year. Citizenship and Immigration Canada reported that "[i]n 2003, a total of 221,352 people became permanent residents of Canada. This number falls within the planned target range of 220,000 to 245,000 new permanent residents" (CIC 2003a). Statistics Canada reports that the population of visible minorities is expected to increase during the period 2001 to 2017 by 56 to 111 percent (Statistics Canada 2005: 5). In 2001, approximately 70 percent of the visible minority population was born outside of Canada. The immigrant population could reach a level accounting for 22.2 percent of the Canadian population by the year 2017. Half of the top 10 source countries for permanent residents (India, Iran, Pakistan, the Philippines and Sri Lanka) permit polygamy to some degree (CIC 2003a). The table in Appendix B to this report gives a breakdown, by religion, of the total population of Canada in 2001.

Statistics Canada reported that the largest gains in religious affiliation between 1991 and 2001 occurred among those who identified themselves as Muslim, increasing from 253,300 in 1991 to 579,600 in 2001 (Statistics Canada nd-a). Muslims represented two percent of the total population in 2001, up from under one percent a decade earlier. The report commented:

> Immigration was a key factor in the increases for all these groups. The proportion of immigrants entering Canada with these religions increased with each new wave of arrivals since the 1960s. Of the 1.8 million new immigrants who came during the 1990s, Muslims accounted for 15%, Hindus almost 7% and Buddhists and Sikhs each about 5% .

Canada has had apparent success in attracting immigrants with religious affiliations and from countries that permit polygamy. To continue to develop this stream of needed immigration, a review of the immigration policy relating to actually polygamous marriages may be in order. Potential immigrants who are not forced to break up their legal families to make a new life in Canada may be more enthusiastic about seeking admission to this country and may be more likely to thrive after relocating. Permitting immigration of all parties to an actually polygamous marriage would be controversial, in part because parties cannot enter into polygamous marriages in Canada. It could be argued that immigrants chose to come to Canada, aware of the legal, cultural and social differences, and that they must be prepared to give up many of their own practices and values if they wish to have the benefits of moving to Canada. Legal philospher Patrick Devlin has said:

> [I]n England we believe in the Christian idea of marriage and therefore adopt monogamy as a moral principle. Consequently the Christian institution of marriage has become the basis of family life and so part of the structure of our society.... But a non-Christian is bound by it, not because it is part of Christianity but because, rightly or wrongly, it has been adopted by the society in which he lives...[I]f he wants to live in the house [ie. society], he must accept it as built in the way in which it is.[71]

Others support a more tolerant approach to those who are parties to a polygamous marriage.[72] Although the institution of polygamy may be objectionable because of its connection with gender inequality, it is legal in many countries. To address this problem, Canada can support the efforts by such bodies as the United Nations to persuade countries to abolish the practice. Registering our objections to polygamy by refusing to permit immigration of all parties to a valid foreign polygamous marriage, however, would most likely harm women who are parties to such marriages and who are left behind.

Recommendation 5: Parties to a valid foreign polygamous marriage that is actually polygamous are not able to immigrate to Canada as an intact family unit. This rule prevents immigration by parties in such marriages or breaks up the family unit so the husband and one wife can immigrate to Canada. The parties most likely to suffer from this rule are the left-behind wives. Permitting immigration by actually polygamous families would indicate toleration, but not endorsement, of the practice of polygamy within Canada. Canada should consider whether the prohibition on immigration by parties to actually polygamous marriages is necessary.

III. SHOULD CANADA DECRIMINALIZE POLYGAMY AND PLURAL UNIONS?

The current prohibition against polygamy is set out in s. 293 of Canada's *Criminal Code*.

> 293. (1) Every one who
> (a) practises or enters into or in any manner agrees or consents to practise or enter into
> (i) any form of polygamy, or
> (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or
> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (*a*)(i) or (ii),
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.[73]

Section 293 applies to parties who "practise" polygamy in Canada, and this would apply to those who are parties to a valid foreign polygamous marriage. The justification for criminalizing those who carry on a marital relationship that was legally sanctioned in their home country is unclear.

A distinct but related issue is the application of s. 293 to parties to a plural union who go through a religious ceremony within Canada. Section 293 covers not only polygamous marriages in the legal sense but also any "conjugal union" whether or not it is recognized as a binding form of marriage. Thus, by its terms, the provision would apply to parties who enter into a plural union in Canada, despite the fact that any such arrangement would be a nullity. That is not to say that there could be *no* legal consequences arising from such unions. As discussed above, some of the incidents of marriage that have been extended to unmarried partners may attach to parties to plural unions if those incidents are not limited to unions of two people. But under the law, plural unions would not be marriages, and any legal consequences would not be based on the plural union but rather on cohabitation for a certain period, unjust enrichment or a child born to the relationship.

The rationale behind using the criminal law to address problems relating to plural unions is unclear. The Law Reform Commission of Canada recommended abolition s. 293 in 1985 (Gordon 2002). The Commission, in reference to plural unions celebrated in Canada, stated:

> [P]olygamy appears so foreign to our values and our legal system that it is both unnecessary and excessive to sanction it criminally. …Abolishing the crime of polygamy does not amount to condoning the practice. Our legal institutions and the institution of marriage adequately preserve the principle of monogamy. Repealing the offence of polygamy is thus evidence of moderation and a mark of confidence in our own institutions. By not giving polygamy any legal recognition, matrimonial law ensures that this phenomenon is not viable in Canada. This should therefore be reflected in the *Criminal Code* (Gordon 2002: 29).

Various other analysts have weighed in on the issue. In their writings no clear distinction is drawn between valid foreign polygamous marriages and plural unions. Rather, they seem to include all such arrangements under the term "polygamy." For example, Young and Gold (1994) endorsed the 1985 recommendation of the Law Reform Commission of Canada to remove polygamy from the *Criminal Code*. They argued that, in regard to a consensual crime such as polygamy, there was a strong case for religious accommodation, provided the harms to society did not outweigh the concern for religious liberty.

Hamid (1994), on the other hand, rejected the notion that there should be accommodation for religiously mandated polygamy. He argued that such accommodation would support patriarchal religious practices that denigrate the status of women in society and cause significant harm to participants and others. Currie, in a subsequent report, agreed with Hamid, stating:

> Despite the recognition of the increasing diversity of family and household forms emerging in Canada because of divorce and remarriage, single parenting, and cohabitation of both homosexual and heterosexual couples, polygamy presents a problem from the point of view of gender inequality. Traditionally, polygamous marriages appear to be almost universally associated with inequality between the sexes (Currie 1994: para. 3.1.3).

In its 2001 paper, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, the Law Commission of Canada questioned the need for criminal sanctions.

> Further study is required on the effects of polygamy and the appropriate governmental response, for example, around inequality and balance of power issues which may exist within the relationship. However, it is reasonable to question whether use of the *Criminal Code* is the best way to respond to these issues (IRC 2001: n. 32).

The British Columbia Civil Liberties Association (BCCLA) also supported the repeal of s. 293. The BCCLA reasoned that "it is a matter of personal autonomy for individuals to choose their preferred type of conjugal relationship" (BCCLA 2001: 7). The Board of the BCCLA (2001: 7) adopted the following resolution.

> The BCCLA opposes the prohibition on polygamy on the grounds that all of the other alleged abusive and exploitive acts (child and spousal abuse) are clearly prohibited by existing, ordinary criminal provisions – provisions which the BCCLA believes should be vigorously applied, whether the relevant relationships are monogamous, bigamous, or polygamous. Mounting a fresh and additional attack on polygamous relationships *per se* adds nothing to this equation beyond creating additional impediments to important human freedoms of association, conscience, expression, and religion.

These various reports evince divided views on the issue of criminalization. Those favouring retention of s. 293 generally do so on the basis that polygamy and plural unions are harmful to women and associated with gender inequality. We find more persuasive the arguments in support of decriminalization. Decriminalization does not indicate endorsement of the practice of polygamy or plural unions. Criminalization is not the most effective way of dealing with gender inequality in polygamous relationships. Other criminal provisions address the problems of child and spousal abuse. Although we recommend repeal of s. 293 in its entirety, it is particularly problematic in its application to parties to a valid foreign polygamous marriage who carry on a marital relationship in Canada. This is perhaps particularly so in light of the fact that neither prostitution nor adultery nor unmarried cohabitation is a criminal offence in Canada.[74] Why then should a legally sanctioned marital relationship (albeit, legally sanctioned in another country) be subject to criminal penalty? A similar point can be made in regard to those who enter into plural union within Canada — in light of the permissive sexual mores of Canada why single out that particular activity for criminal punishment? It is unnecessary and excessive to impose criminal sanctions against those who enter into a plural union in Canada when the plural union would be considered a legal nullity. Finally, criminalizing plural unions arguably violates the parties' freedom of religion, as discussed in the next section.

Potential Charter Challenge to s. 293

Another issue that must be considered is whether s. 293 could be challenged on constitutional grounds. With the adoption of the *Canadian Charter of Rights and Freedoms*,[75] questions have arisen about the constitutionality of this prohibition.[76] A constitutional challenge would have to resolve five legal issues.

- Does the Charter apply to the prohibition against polygamy and plural unions?
- Does the party launching this Charter challenge have standing to litigate it?
- Does prohibiting polygamy and plural unions infringe a Charter right?
- Can Canada justify infringing this Charter right?
- What remedy would be available?

Does the Charter Apply to the Prohibition Against Polygamy?

The *Criminal Code* was enacted by the Parliament of Canada, and the Charter applies to all matters within the authority of Parliament.[77] Therefore, any section of the *Criminal Code* that is inconsistent with the Charter will be unconstitutional.

Does the Party Launching This Charter Challenge Have Standing to Litigate It?

Specifically, do parties who have legally entered into a valid polygamous marriage in their country of origin and subsequently relocated to Canada have standing to challenge the constitutionality of the prohibition against polygamy? Whether a person has "standing" (i.e., to bring legal proceedings) "is a question about whether the person has a sufficient stake in the outcome to invoke the judicial process" (Hogg 1997: 56-3). The simple answer is that if a person were charged with violating s. 293, he or she would have standing to invoke the Charter to challenge the constitutionality of this provision in defence.

However, crown attorneys have been reluctant to prosecute the offence of polygamy. Therefore, the question is whether parties to a valid foreign polygamous marriage could initiate a Charter challenge to s. 293 in the absence of a prosecution. "The general rule is that only the Attorney General has standing to bring proceedings to vindicate the public interest" (Hogg 1997: 56-4). There is an exception to this rule for an individual who can show that she or he is "exceptionally prejudiced" (Hogg 1997: 56-4). Thus, an individual would have standing to initiate a challenge to the constitutionality of s. 293 on showing that "the statute applies to him or her differently from the public generally" (Hogg 1997: 56-5).

Parties who have legally entered into polygamous marriages in their country of origin and subsequently relocated to Canada should be able to show they are "exceptionally prejudiced" by s. 293 of the *Criminal Code*. They are easily identifiable from their immigration and refugee records such that any change in prosecutorial policy would make them immediately vulnerable to criminal charges under s. 293. In contrast, not only are most members of the Canadian public monogamous but also there is no mechanism for identifying those who are not, particularly if they opt to hide their marital status.[78] Under these circumstances, women who have legally entered into polygamous marriages in their country of origin and subsequently relocated to Canada should be able to sustain the claim that they are "exceptionally prejudiced" by s. 293 remaining in the *Criminal Code*, and hence they should be granted "standing" to challenge its constitutionality. Parties to plural unions who live in easily identified communities that endorse the practice of plural unions could make a case that they are "exceptionally prejudiced" by s. 293.

Does Prohibiting Polygamy Infringe a Charter Right?

A constitutional challenge to s. 293 would most likely be based on the right to freedom of religion, set out in s. 2(a) of the Charter, which provides: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion."[79]

Parties who for religious reasons legally entered into polygamous marriages in their country of origin before relocating to Canada or who entered into a plural union within Canada would need to establish their adherence to a "religion" within the definition adopted by the Supreme Court of Canada. In the *Anselem* case, Justice Iacobucci, writing for the majority, held:

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[80]

Parties who claim that polygamous marriage is consistent with their religious beliefs "need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion."[81] Rather, the most that courts may inquire into is "the sincerity of a claimant's belief, where sincerity is in fact at issue."[82] Moreover, "the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not artifice."[83] Thus it would not be difficult for parties who entered into valid foreign polygamous marriages or plural unions within Canada for religious reasons to show that they believe the practice has a nexus with their religion and that they are sincere in this belief.

Once freedom of religion is triggered, a claimant must "show that the impugned…legislative provision…interferes with his or her ability to act in accordance with his or her religious beliefs *in a manner that is more than trivial or insubstantial.*"[84] Although the degree of interference may be debatable in some contexts, there is no question that being charged with and convicted of an indictable offence for which the penalty could be incarceration for five years (as s. 293 provides) is a non-trivial interference.

In sum, these religious claimants should be able to make out a case that s. 293 interferes with their Charter right to freedom of religion. However, this is not the end of the matter. As with other Charter rights, the right to religious freedom is not absolute. The Canadian government may claim that s. 293 is a valid limitation on the exercise of the right to freedom of religion. If so, Canada must use the Charter to justify this claim.

Can Canada Justify Infringing This Charter Right?

To justify s. 293 of the *Criminal Code* prohibiting polygamy, the Canadian government must argue that it is consistent with s. 1 of the Charter, which provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[85]

The Supreme Court of Canada developed the *Oakes* test to determine which claims about limiting rights are justifiable under s.1. The *Oakes* test has two central criteria that the government must satisfy to justify limiting a Charter right. First, the objective of the impugned provision must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom;" that is, it must "relate to concerns which are pressing and substantial."[86] Second, there is "a form of proportionality test" which has three components: the measures "must be 'rationally connected' to the objective;" they "should impair 'as little as possible' the right or freedom in question;" and "there must be a proportionality between the *effects* of the measures…and the objective."[87] Thus, Canada has the burden of showing on a balance of probabilities that s. 293 meets these four s. 1 requirements: pressing and substantial objective, rational connection, minimal impairment, and deleterious/salutary effects.

Pressing and Substantial Objective

Canada will presumably argue that the pressing and substantial objective of s. 293 is gender equality. In particular, Canada may claim the prohibition on polygamy and plural unions is aimed at the protection of women and children. This contention has a long history (Kames 1796; Hume nd). In the late 19th century, the United States repelled a religious freedom challenge by a Mormon polygamist in a bigamy case in which the trial court judge had charged the jury to "consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children, — innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers."[88] However, no reference was made to this objective in the seven Canadian cases that have interpreted the prohibition against polygamy.[89] Although few in number, these cases should not be discounted, especially since four of them explicitly attribute the rationale for the prohibition to the existence of Mormon polygamy in the United States.[90]

Canada might try to reinforce its argument about gender equality by invoking another historical case, the bigamy reference. Decided by the Supreme Court of Canada in 1897, long before the Charter, this case concerned the constitutionality of the extraterritorial features of the prohibition against bigamy found in the same part of the *Criminal Code* as the polygamy section. "Bordering as Canada does upon several foreign States, in many of which the laws relating to marriage and divorce are loose, demoralizing and degrading to the marriage state," Chief Justice Strong observed, "such legislation as is contained in the [bigamy] sections of the *Criminal Code* seem to be absolutely essential to the peace, order and good government of Canada, and in particular to the maintenance within the Dominion of the purity and sanctity of the marriage state."[91] While referring neither to polygamy, plural unions, nor to gender directly, this statement about the objective of a related provision nevertheless strongly implicated social relationships. Moreover, Canada might adduce contemporary support by pointing to the United Nations position that polygamy contravenes women's equality rights (UNCEDAW 1992: 1).

In effect, the Canadian government must advocate the gender equality objective, because it is the only argument available to establish a secular objective for s. 293. The counter argument is that s. 293 serves a religious purpose that does not qualify as a pressing and substantial objective. To sustain this counter argument, it is necessary briefly to review the history of the prohibition against polygamy and the relevant Charter jurisprudence.

The historical origins of prohibitions against polygamy, plural unions and bigamy are ecclesiastical, dating back to the 13th century in England, when "[p]olygamy…was cognizable only in the ecclesiastical courts where it was presumably subject to the normal penalties for immorality."[92] (It should be noted here that historically the term "plural unions" was not used; rather those arrangements were generally included in the term "polygamy.") From about 1547, "the use of the term polygamy begins to decline, and the term bigamy begins to be used in the sense of being married to two wives simultaneously" (Bartholomew 1958: 260). The first English statute making bigamy a felony was enacted in 1603 (Bartholomew 1958).

In Canada, polygamy and plural unions were first proscribed in 1890.[93] Three years later it was included in Canada's first *Criminal Code*.[94] The prohibition was in reaction to the difficulties the American authorities were having in dealing with the polygamous practices of the Mormons in Utah at the time (LRC 1985: 22; Gordon 2002). The U.S. Congress, whose members expressed the view that polygamy was a practice as heinous as slavery, passed *The Edmunds Act* in 1882.[95] This Act outlawed bigamy and polygamy in the U.S. Territories (which at that time included Utah) and provided for disenfranchisement of all who were convicted of those crimes. In 1889, *The Globe* reported on the immigration of Mormons to Alberta, and on the group's unsuccessful request to Canada's Parliament for special privileges (*The Globe* 1889: 4).

In the Parliamentary debates on the provision in the Bill dealing with bigamy, Sir John Thomson explained that it was "intended to extend the prohibition of bigamy…to make a second marriage punishable during the life of a wife or husband, whether the marriage took place in Canada or elsewhere, or whether the marriage takes place simultaneously, or on the same day."[96] In regard to the polygamy prohibition, Thomson stated that he was not aware that the practise yet existed in Canada but that it did pose a threat. He said, "I think it will be much more prudent that legislation should be adopted at once in anticipation of the offence, if there is any probability of its introduction rather than we should wait until it has become established in Canada."[97] Thus a clause explicitly referring to Mormons was inserted in the provision prohibiting polygamy and remained in the *Criminal Code* until it was amended in 1954.[98]

The prohibition's ecclesiastical origins as well as its express reference to Mormons suggest that its pressing and substantial objective is to serve a religious purpose. Without doubt, the contemporary rationale for retaining the provision in the *Criminal Code* may be gender equality. However, the Supreme Court of Canada will not entertain shifting purposes, meaning that the government can rely only on the purpose that animated the provision when it was enacted.[99] Indeed, in a similar situation the Court refused to attach a contemporary objective to the *Criminal Code* prohibition against spreading false news after tracing its historical origins to 13th century England.[100] To overcome the rule against shifting purposes, Canada would have to show that its gender equality argument was not a shifting purpose, but rather a "permissible shift in emphasis"[101] from that of the law's original religious purpose.

If the transformation from religious to secular objective was to prove insurmountable, Canada would be hard pressed to maintain that the religious objective of s. 293 is pressing and substantial. In its first religious freedom case, the Supreme Court of Canada held that the purpose of a federal Sunday closing law was "to compel the observance of the Christian Sabbath," which directly contradicted the Charter right to freedom of religion, "and could not be a purpose that justified limiting the right."[102] Analogously, therefore, if the purpose of the prohibition against polygamy in s. 293 of the *Criminal Code* is to compel the Christian practice of monogamous marriage, it cannot be a purpose that justifies limiting the s. 2(a) Charter right to religious freedom of women who have legally entered into polygamous marriages in their country of origin and subsequently relocated to Canada.

If this counter-argument were upheld, the rights seekers would have successfully challenged the constitutionality of s. 293; the only remaining issue would be the remedy. In other words, there would be no need to develop the arguments pertaining to the remainder of the *Oakes* test. However, Canada's argument for gender equality as the pressing and substantial objective of

s. 293 might prevail. If so, the *Oakes* test would require consideration of the three components of the second, or proportionality, criteria. Accordingly, there are three remaining questions. Is the criminal prohibition against polygamy and plural unions rationally connected to the objective of gender equality? Does it minimally impair religious freedom? And, is there proportionality between its deleterious and salutary effects?

Rational Connection

Canada would support the claim that prohibiting polygamy and plural unions is a rational means of reducing gender inequality by adducing evidence about the subordination of women in polygamous relationships. Anecdotal evidence is not difficult to find. Groups such as the Center for Public Education and Information on Polygamy (nd) have a Web site where they track polygamous practices around the world. Wives and daughters who have escaped polygamous marriages publish books about their experiences (Solomon 2003). As well, social science evidence from studies of Mormon communities in the United States exists, although this literature does not uniformly sustain the claim for a relationship between polygamy or plural unions and gender inequality.[103]

The causal connection between polygamy or plural unions and women's subordination need not be established scientifically, however. In a decision impugning an advertising ban on tobacco products, the Supreme Court of Canada held that the causal connection between the ban and the objective of reducing tobacco consumption could be based on common sense, reason or logic.[104] Even such a relaxed approach to causation may not assist Canada's claim for the effectiveness of criminalizing polygamy. This is because, with the possible exception of Mormon plural unions, the connection between polygamy or plural unions and the subordination of women is both under- and over-inclusive. On the one hand, it is under-inclusive, because women's subordination is by no means unknown in marriages that are monogamous. On the other hand, the prohibition against polygamy and plural unions is over-inclusive, because not all polygamous marriages or plural unions subordinate women. To the contrary, whether women are subordinated depends on the prevailing religious beliefs about the relationship between the sexes. Some religions still proselytize men's domination; others no longer do so. Thus, criminalizing polygamy and plural unions seems to be an arbitrary approach to the problem of gender inequality, rather than one that is driven by the dictates of common sense, reason or logic.

Minimal Impairment

Canada must also demonstrate that using the criminal law to prohibit polygamy and plural unions does not unnecessarily restrict religious freedom. This requirement is one of minimal impairment. In other words, the government must argue that criminalizing polygamy and plural unions represents the least drastic means for achieving the government's objective, which is to reduce gender inequalities in marital relationships. This feature of the s. 1 test is not as easy for rights seekers to establish as it might otherwise appear, because courts often defer to legislative wisdom concerning alternative ways to achieve governmental objectives. However, the polygamy and plural unions ban is unusual insofar as crown attorneys seldom invoke it. Absent such prosecutions, there is no contemporary evidence establishing the consequences of criminalization. Under these circumstances, we do not know whether the criminal ban is effective, that is, whether it has any impact on women (or men) considering polygamous or plural union relationships, let alone whether such relationships would necessarily result in the subordination of women.

However, immigration and refugee cases and media stories tell us that banning polygamy has not stopped women who legally entered into actually polygamous marriages in their country of origin from applying to relocate in Canada. If they are successful, or indeed even if they merely visit Canada, it is hardly a minimal impairment of their Charter right to freedom of religion that they are vulnerable to being charged with an indictable offence, which carries a penalty of incarceration for up to five years. It could be argued that criminalization has a disproportionate effect on immigrants and serves to further entrench social, class and economic stratifications.

Because Canada's marriage laws are sufficient to achieve the objective of denying legal recognition to plural unions, it is difficult to avoid the conclusion that criminalization is excessively punitive in regard to such unions. Women who face physical or mental abuse in any relationship, whether monogamous or polygamous, have now and would continue to have access to the general *Criminal Code* provisions that prohibit such harms.

Deleterious/Salutary Effects

If Canada were to meet the pressing and substantial objective, rational connection and minimal impairment criteria for justifying the criminal prohibition on polygamy and plural unions, what would remain "is a balancing of the objective sought by the law against the infringement of the civil liberty. It asks whether the *Charter* infringement is too high a price to pay for the benefit of the law" (Hogg 1997: 35-39). The Supreme Court of Canada refined this requirement to one of considering not only the objective of the law but also its salutary effects.[105] In the context of the polygamy and plural unions ban, the issue is whether the risk of harm to women justifies the costs to freedom of religion.

What Remedy Would Be Available?

The challengers would seek to have s. 293 of the *Criminal Code* declared unenforceable by invoking s. 52(1) of the *Constitution Act 1982*, which provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[106]

When the Supreme Court of Canada set out the six remedies available under s. 52(1), the first possibility was nullification, that is, striking down (declaring invalid) the statute that is inconsistent with the Charter.[107] While Canada would oppose this remedy, it is unlikely to express a preference for any of the others (i.e., temporary validity, severance, reading in, reading down or constitutional exemption). Accordingly, the result of a successful Charter challenge would be nullification, which is tantamount to decriminalization.

Recommendation 6: Criminalization is not the most effective way of dealing with gender inequality in polygamous and plural union relationships. Furthermore, it may violate the constitutional rights of the parties involved. Canada should repeal the prohibition against polygamy and plural unions in s. 293 of the *Criminal Code*.

IV. WOULD EXPANDED RECOGNITION OF FOREIGN MARRIAGES OR DECRIMINALIZATION OF POLYGAMY AND PLURAL UNIONS LEAD TO LEGALIZATION OF THE CELEBRATION OF POLYGAMOUS MARRIAGES IN CANADA?

No Necessary Connection Between Recognition of Foreign Marriages or Decriminalization and Domestic Law

Extending further recognition to foreign polygamous marriages does not imply condonation of the practice of polygamy. Rather it gives effect to the principle of universality of status. Nor does decriminalization of polygamy and plural unions imply condonation of the practice of polygamy. Rather, it recognizes the limitations of criminal law in addressing the harms associated with the practices and gives effect to the Charter rights of parties to such relationships. These recommended law reforms do not carry the implicit suggestion that this country's domestic laws should be amended to permit polygamous marriages to take place in Canada. However, the question of whether polygamous marriages should be permitted to take place in Canada may be seen as linked to such law reforms and is addressed in this section.

The British Columbia Law Institute (1998) issued a report on proposed domestic partner legislation. One possibility canvassed briefly by the Institute, and supported by a minority of its members, was that of domestic partnerships comprising more than two persons. The rationale for creating a multiple domestic partnership scheme was to expand the range of choices and better address the needs of British Columbians.

> An issue that received a great deal of consideration was whether it was necessary to restrict domestic partnership to two people. A significant minority of the board was in favour of allowing a person to have more than one domestic partner because it would serve the needs, for example, of a family unit consisting of a brother and sisters, each wishing to ensure that various entitlements, such as employment benefits, would be equally available to all. It was agreed, however, that this was an issue that might be reconsidered in the future after there has been some experience with domestic partner declarations (BC Law Institute 1998: 12).

A multiple domestic partnership would be a newly created institution, unconnected with any religious history or practice, and therefore would not carry the same "baggage" as polygamy. Multiple domestic partnerships could be crafted to protect the fundamental values of Canada. There does not seem to be much demand for multiple domestic partnerships, however, so it is unsurprising that the British Columbia Law Institute did not develop this idea more fully.

While there seems to be no demand for a strictly secular institution of multiple domestic partnerships, there may be some demand for polygamy from those whose religions support the practice. Should Canada consider permitting such parties to enter into polygamous marriages? Would such an accommodation of religious practices be the logical outgrowth of Canada's commitment to multiculturalism and freedom of religion? Would it be possible to permit polygamy while maintaining gender equality and other fundamental values of Canadian society?

Parkinson (1994: 503) has argued that "the importance of preserving the inherited cultural values of the majority must be balanced against the effects of such a law on the minority's capacity for cultural expression." For Parkinson (1994: 503),

> an insistence upon preserving marriage as a monogamous institution would be more compelling if the Christian understanding of marriage were preserved by the law in other respects, and other marriage-like relationships were not given legal recognition. However, the widespread acceptance of *de facto* relationships which involve no promises of lifelong commitment, and their recognition by law for a multitude of purposes, undermines any claim that the law seeks to uphold Christian values[.] Homosexual relationships are also recognised for a small number of purposes in Australian law.

Parkinson (1994: 499) also suggested that "it would be possible to frame a law recognizing polygamy which took account of the need for gender equality." Parkinson (1994: 499) contended that "the law would need to be gender-neutral…and would require the full and free consent of the first marriage partner." He (1994: 499) suggested:

> One approach would be to require the consent of the Family Court to a polygamous marriage, after an enquiry, assisted by the Family Court Counselling Service, to ensure that the parties to the initial marriage and to the new marriage gave a full and free consent, and that the marriage was justified by the cultural practices of the ethnic group to which one or more of the parties belonged.

Parkinson (1994: 477) did not elaborate on this last restriction, even though it seemed inconsistent with his earlier reference to "the principle, which is a fundamental premise of western legal systems, that all members of society should be governed by the same laws."

Canadians are free to practise any religion or to have no religion at all, and this freedom is guaranteed by the Charter.[108] However, the law does not enforce the religious doctrine of any religion, and religious laws have no legal status in Canada. Religious practices must exist within Canadian laws. The notion that freedom of religion or the principle of equality should include the right to have one's civil status determined in accordance with religious law has never been accepted in Canada. However, in some states, matters of family and succession law are governed by "personal law" in the sense of the laws relating to one's tribe or religion, rather than by the civil law. In India, where matters of family and succession law are governed by the laws of one's religion, the system has led to controversy and has been called into doubt by the Supreme Court. In *Vallamattom v. Union of India*, Chief Justice Khare said in reference to the articles that guarantee freedom of religion:

> [M]arriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution [which anticipates the creation of a common civil code and the abandonment of religious laws] has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing contradictions based on ideologies.[109]

In the United Kingdom, a proposal to establish a separate system of Muslim family law was rejected in favour of a secular universal system to uphold human rights, particularly gender equality (Fournier 2004: 21). The South African Law Reform Commission (2003), on the other hand, proposed to legalize polygamous ("Muslim") marriages and to establish a separate system of Muslim family law. The Commission's report indicated that its recommendation was controversial, in part because Islamic groups disagreed on the content of the proposed law. There was no general acceptance as to how to incorporate Islamic marriage laws into the existing civil system while at the same time protecting the basic values of the state, including gender equality. The diversity of religions that support polygamy would also pose a challenge to anyone attempting to incorporate religious (Islamic or otherwise) norms into Canadian law. As the Canadian Council of Muslim Women (2004) has said, "Muslim law is not monolithic, nor simple, nor applied consistently across the world."

Even the issue of whether polygamy should be legalized in this country is a matter on which there is a diversity of views within the relevant religious communities. Both the president of the Canadian Muslim Association and senior members of Britain's Muslim community, for example, affirmed that that there was no demand coming from within these communities to legalize polygamy within Canada or the United Kingdom (Smith 2004). In Britain, members of the Muslim community are trying to reduce the number of polygamous relationships and advising against religious marriages that are not legally valid. Guidelines issued last year by the Muslim Parliament advised against weddings ratified only through Islamic ceremonies. These Guidelines stated: "No Muslim should seek to contract a marriage without the full protection of the law of the land," and that the "[p]ersons most likely to be harmed by avoiding the civil registration would be the wives, who would only then have the status in the UK of unmarried 'partners'— a status forbidden in Islam. The children would be illegitimate. No Muslim man should wish to put his spouse or offspring in such a dishonourable position" (Smith 2004).

At least among the Muslim community, the context for the practice is critical to justifying polygamy. As Dr. Ghayasuddin Siddiqui, leader of the Muslim Parliament, said: "In my view, in this country there are absolutely no reasons why people would have more than one wife" (Smith 2004).

Amending marriage law, to incorporate personal laws connected to one's religious affiliation, would be inconsistent with Canada's history and values. It would also run counter to the increasingly secular nature of marriage in Canada. This trend is reflected in the laws relating to solemnization of marriage by secular officials (Arnup 2001: 8-14), amendments to the law relating to the prohibited degrees of consanguinity and affinity that abandon religious norms,[110] and the opening up of marriage to same-sex couples. Estin (2004) discussed the religious roots of the current secular marriage law in the United States, and her thesis that marriage no longer carries a religious character is applicable to Canada. In *Beyond Conjugality*, the Law Commission of Canada (2001) commented: "The history of marriage regulation in Canada has thus been characterized by a progressive uncoupling of religious and legal requirements, reflecting a growing emphasis on the separation of church and state in a secular and pluralistic political community."

In the *Reference re Same-sex Marriage*, the Supreme Court of Canada noted that the notion of "Christian" marriage enunciated in *Hyde v. Hyde* was no longer relevant. "*Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution."[111] It should also be noted that one recent survey showed that a large majority of Canadians (96 percent) disapprove of polygamy (Bibby 2005).

Possible Constitutional Challenges

As with other western countries, Canada has defined marriage as a relationship between one man and one woman. As mentioned earlier, the definition accepted in Canada since 1866 has been "the voluntary union of one man and one woman, to the exclusion of all others."[112] The requirement that parties be of the opposite sex was successfully challenged as a violation of the Charter guarantee of equality.[113] In 2004, the Supreme Court ruled that a bill to open up civil marriage to same-sex couples was constitutional.[114] This jurisprudence has occasioned some speculation about the possibility of using the Charter to challenge the constitutionality of restricting the capacity to marry in Canada to monogamous unions.[115]

A Charter challenge could be brought against the common-law definition of marriage, which was successfully impugned in the same-sex marriage cases,[116] or, were it to become law, the statutory definition of marriage proposed in the Civil Marriage Bill,[117] or the *Divorce Act*, which does not extend "matrimonial relief" to parties to a polygamous marriage,[118] or to the regulations to the *Immigration and Refugee Protection Act*, which allow visa officials to refuse to consider polygamous marriages.[119] As well, if a person were refused a marriage licence, or a divorce, or permanent residence on the grounds of being a party to an actual (or pending) polygamous marriage in Canada, the refusal would constitute the basis for standing to launch a Charter challenge.

The issue of which Charter rights might be infringed by limiting the civil status of marriage to monogamous unions is rich with possibilities. Ironically, the right most often cited in this context — the Charter s. 2(a) right to freedom of religion — should not be counted among these possibilities. Section 2(a) would be very relevant to a Charter challenge to the criminal ban on polygamy. If such a challenge were successful, it would remove the sole obstacle to the religious practice of polygamous marriage. That is, religions that permit polygamy would be able to perform marriages for polygamous adherents. Their freedom to use religious rites to sanction polygamous marriages would no longer be impeded in any way by the state. However, these religions would not be entitled to bestow the civil status of marriage on polygamous unions. Civil status is by definition subject to political, not religious, decision making. Thus, decriminalization would permit religious celebration but not civil recognition of polygamous marriages.

The rights most likely to be invoked by parties seeking to challenge the constitutionality of defining civil marriage as monogamous are guaranteed in ss. 7 and 15(1) of the Charter. Section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[120] The right to liberty is the most likely basis for this challenge. The Supreme Court of Canada has ruled that liberty is not restricted to "mere freedom from physical restraint"; rather it may also apply when the law prevents a person from making "fundamental personal choices."[121] In Canada today, it is difficult to conceive of a more fundamental personal choice than whom one chooses to marry.

Section 15(1) of the Charter, the equality guarantee, provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[122] Parties challenging the prohibition on polygamous marriages might invoke as many as five different grounds of discrimination. Because foreign polygamous marriages are recognized as valid in Canada, at least for some purposes, residents refused marriage licences for pending polygamous marriages could argue citizenship or marital status discrimination. Section 15(1) makes no reference to citizenship or to marital status. However, the Supreme Court of Canada has ruled that citizenship and martial status are analogous grounds of discrimination.[123]

Challengers could also invoke several of the enumerated grounds of discrimination, in particular national or ethnic origin discrimination and religious discrimination. Neither of these grounds of discrimination has been the basis of a successful Charter challenge to date.[124] However, this does not necessarily portend defeat for parties who would use section 15(1) to challenge the definition of marriage. Rather each case must be decided on the basis of its own set of facts.

It may also be possible to challenge the definition of marriage on the basis of sex discrimination. Specifically, some women may be parties to religious polygamous marriages that are not recognized under Canadian law. Such women may not have the power to end their religious marriages without their husbands' consent. For example, the teachings of Islam give the natural right of divorce exclusively to the husband.[125] Islam also provides alternative methods of divorce: the "mutually consensual *khul'* generally entails a certain amount of remuneration from the wife to the husband (usually her *mahr*) while judicial dissolution (*faskh*) involves an assessment of blame by the outside arbiters in order to determine the financial rights of each spouse" (Quraishi and Syeed-Miller nd). However, without mutual consent and approved grounds,[126] a wife could not access these methods. In the absence of a legally recognized marriage, she would not be able to terminate her religious polygamous marriage under the *Divorce Act*. Thus, she might argue that the state's failure to provide a termination mechanism compounds the original religious discrimination on the ground of sex, thereby denying her closure and dignity. A s.15(1) precedent exists wherein the Supreme Court of Canada ordered the rectification of a legislative omission.[127]

There are two important reasons for caution in predicting the outcome of any s.15(1) equality challenge. One arises because the Supreme Court of Canada has made it more difficult to establish a violation of s.15(1) than any other provision of the Charter. A breach of s.15(1) requires affirmative responses to the following three broad inquiries.

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?[128]

The other cautionary note is more pragmatic. A recent study of s. 15(1) jurisprudence revealed that equality seekers lost 80 percent of the first 44 Charter equality rights decisions rendered by the Supreme Court of Canada (Martin 2001: 370-1). Moreover, 70 percent of these losses occurred at the s. 15(1) stage, with proof of discrimination being the most difficult hurdle to overcome (Martin 2001: 306).

If necessary, Canada would invoke s. 1 of the Charter to justify the limitation of marriage to two persons. Were the government to suggest that marriage is monogamous, because it always has been monogamous, it might meet the same response as was delivered by the Ontario Court of Appeal in one of the same-sex equality cases, namely that such a statement "is merely an explanation for the [monogamous] requirement of marriage; it is not an objective that is capable of justifying the infringement of a Charter guarantee."[129] Similarly, were Canada to argue that the purpose of marriage is to unite two persons, one response might be that "a purpose that demeans the dignity of [religious polygamists] is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial."[130]

Canada would have a better chance of justifying the limitation of marriage to two persons by characterizing the objective in terms of social stability and order. To the extent that this objective reduces the debate to utilitarian considerations, it may not be available to limit a Charter right.[131] The Supreme Court of Canada recently rejected claims of cost and administrative expediency as limits on equality rights.[132] However, if Canada were to demonstrate that the costs of including polygamy would be so high as to be prohibitive, the federal government might succeed in justifying the limit on a Charter right.[133] Alternatively, if the cost of complying with a Charter right is high but not prohibitive, that could be a basis for fashioning a remedy that spread compliance over an extended time period.

The most compelling objective that Canada could adduce for the limitation of marriage to two persons is that polygyny demeans women. This objective is secular. It is consistent with the values of a free and democratic society. And, it is sufficiently pressing and substantial to justify infringing Charter rights. Moreover, in support Canada would cite its commitment to the UN *Convention on the Elimination of All Forms of Discrimination against Women*. According to the U.N. Committee on the Elimination of Discrimination against Women, states that permit polygamy are in contravention of their obligation to protect women's equality rights (UNCEDAW 1992: 1).

To meet the three requirements of the proportionality test, Canada would argue that the limitation of marriage to two persons is rationally connected to the objective of protecting women; that it impairs rights no more than is necessary to achieve this objective; and that it does not have a disproportionately severe effect on the rights seekers. In other words, these three components require Canada "to balance the interests of society with those of individuals and groups."[134] A number of other countries, some with similar histories and value systems, have already performed this balancing process. Thus, Canada is likely to draw on their experience to sustain its contention that omitting polygamy is a justifiable limit on equality rights.

In particular, the Australian Law Reform Commission (ALRC), in its 1992 *Report on Multiculturalism and the Law*, concluded that polygamous marriages should not be permitted to take place in Australia. The ALRC acknowledged that

> within the Muslim community, a polygamous marriage may be acceptable and that marrying polygamously is more acceptable to members of that community than entering a *de facto* relationship while still legally married. It also acknowledges as anomalous the Australian law that makes a second marriage a criminal offence but, in some circumstances, treats a *de facto* relationship in the same way as a marriage even if one or both parties is legally married or in another de facto relationship. Recognising the legal status of polygamy would, however, offend the principles of gender equality that underlie Australian laws. There is very little support for the recognition of polygamy in the Australian community. The Commission does not recommend that the law should be changed to allow a polygamous marriage contracted in Australia to be recognized as a valid marriage (p. 94).

Responding to the Australian Law Reform Commission report, Parkinson (1994: 504) noted there were divisions of opinion within the Islamic community in Australia. In particular the Australian Federation of Islamic Councils did not call for the recognition of polygamy, stating that it was not a major issue for the Islamic community in Australia. Moreover, "[i]n other parts of the world, the incidence and acceptance of polygamy has declined with women's increasing assertion of their rights [citing Turkey and Pakistan]. Polygamy may thus be a fading institution in many parts of the world, fighting a losing battle with modernity" (Parkinson 1994: 504). Thus, Parkinson (1994: 504) concluded: "In the case of polygamy, the case for recognition is not strong enough at the present time, to justify a further undermining of society's commitment to the preservation of monogamous marriage."

Ironically, the effect of balancing gender equality against religious equality — as was done in Australia, the United Kingdom, and South Africa — is to portray religious communities (and not simply polygamy) as subordinating women. Shachar wrote about the vulnerability of women that results from accommodating the claims of religious communities to control matters, such as family law. Characterizing the situation as a "multicultural dilemma concerning the potential injurious effects of intergroup accommodation upon intragroup power relations," Shachar labelled it as the "paradox of multicultural vulnerability."[135]

However, this paradox is not the only one that would surface if Canada sought to justify the limitation of marriage to two persons. At the stage of balancing the salutary effects of this omission against its deleterious effects, women trapped in religious polygamous marriages that are not legally recognized could point to their own lives to exemplify the deleterious effects of being denied access to divorce which is one of the important incidents of the civil status of marriage. From their perspective, in other words, the proportionality issue should be measured entirely in terms of the effects — both salutary and deleterious — on women. They would undoubtedly share the view of Nathalie Des Rosiers, then president of the Law Commission of Canada, who told Parliament, "It's not in the interests of the people in a polygamous marriage — even what I would call the victims — to have their union not recognized, because they cannot benefit from the protection that marriage gives."[136]

Recommendation 7: A constitutional challenge may be brought to the limitation of marriage to two persons. Canada should prepare for such a challenge, including one that may be based on sex discrimination and initiated by women trapped in religious polygamous marriages.

CONCLUSION

Further recognition of valid foreign polygamous marriages is warranted to ensure that parties to such marriages are not deprived of the legal benefits and protections of marriage. Women are most likely to be in need of and most likely to benefit from further recognition. Further recognition of valid foreign polygamous marriage is not an endorsement of the practice of polygamy, which has long been associated with the inequality of women. This problem should not be addressed by denying "the victims" in valid foreign polygamous marriages the legal protection of marriage. Section 293 of the *Criminal Code* does not effectively address the harms associated with polygamy or plural unions and may be impugned on constitutional grounds. Therefore, Canada should repeal this provision. It is possible that a constitutional challenge will be brought to the limitation of civil marriage to two persons, and Canada should be prepared for such a challenge.

APPENDIX A: *PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995*

c. 42 (U.K.)

s. 5 (1) A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and Wales.

(2) This section does not affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be so determined in accordance with the rules of private international law.

s. 6 (1) Section 5 above shall be deemed to apply, and always to have applied, to any marriage entered into before commencement which is not excluded by subsection (2) or (3) below.

(2) That section does not apply to a marriage a party to which has (before commencement) entered into a later marriage which either

(a) is valid apart from this section but would be void if section 5 above applied to the earlier marriage; or
(b) is valid by virtue of this section.

(3) That section does not apply to a marriage which has been annulled before commencement, whether by a decree granted in England and Wales or by an annulment obtained elsewhere and recognised in England and Wales at commencement.

(4) An annulment of a marriage resulting from legal proceedings begun before commencement shall be treated for the purposes of subsection (3) above as having taken effect before that time.

(5) For the purposes of subsections (3) and (4) above a marriage which has been declared to be invalid by a court of competent jurisdiction in any proceedings concerning either the validity of the marriage or any right dependent on its validity shall be treated as having been annulled.

(6) Nothing in section 5 above, in its application to marriages entered into before commencement—

(a) gives or affects any entitlement to an interest—
  (i) under the will or codicil of, or on the intestacy of, a person who died before commencement; or
  (ii) under a settlement or other disposition of property made before that time (otherwise than by will or codicil);
(b) gives or affects any entitlement to a benefit, allowance, pension or other payment—
  (i) payable before, or in respect of a period before, commencement; or
  (ii) payable in respect of the death of a person before that time;

(c) affects tax in respect of a period or event before commencement; or
(d) affects the succession to any dignity or title of honour.

(7) In this section "commencement" means the commencement of this Part.

s. 7 (1) A person domiciled in Scotland does not lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permits polygamy.

(2) For the avoidance of doubt, a marriage valid by the law of Scotland and entered into

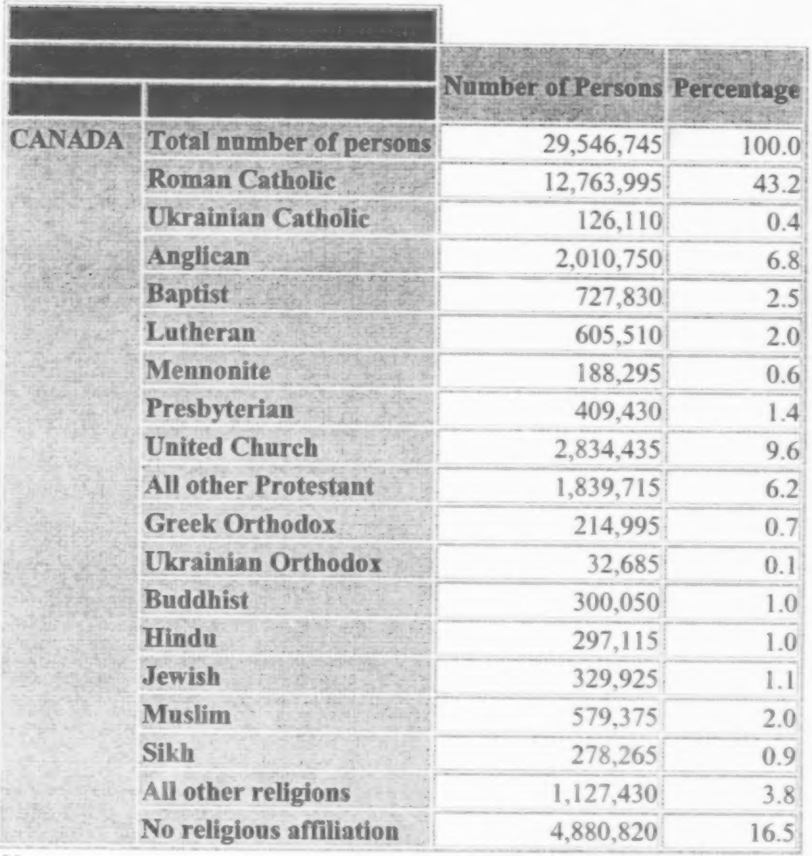
(a) under a law which permits polygamy; and
(b) at a time when neither party to the marriage is already married,

has, so long as neither party marries a second spouse during the subsistence of the marriage, the same effects for all purposes of the law of Scotland as a marriage entered into under a law which does not permit polygamy.

The Tax Credits (Polygamous Marriages) Regulations 2003 (U.K.), No. 743

> s. 50 (2) There shall be established, for each particular child or qualifying young person for whom any or all of the members of the polygamous unit is or are responsible (a) the member of that unit who is (for the time being) identified by all the members of the unit as the main carer for that child or qualifying young person; or (b) in default of such a member, the member of that unit who appears to the Board to be the main carer for that child or qualifying young person.
>
> (3) The individual element of child tax credit for any child or qualifying young person shall be paid to the main carer of that child or qualifying young person. (4) The family element of child tax credit for any polygamous unit shall be divided (pro rata) by the number of children and qualifying young persons for whom any or all of the members of that unit is or are responsible, and the proportion so attributable to each such child or qualifying young person shall be paid to the main carer of that child or qualifying young person. (5) Any child care element of working tax credit shall be divided (pro rata) by the number of children referred to in paragraph (2) in respect of whom relevant child care charges are paid, and the proportion so attributable to each such child shall be paid to the main carer of that child.

APPENDIX B: CANADA, RELIGIOUS AFFILIATION, 2001



		Number of Persons	Percentage
CANADA	Total number of persons	29,546,745	100.0
	Roman Catholic	12,763,995	43.2
	Ukrainian Catholic	126,110	0.4
	Anglican	2,010,750	6.8
	Baptist	727,830	2.5
	Lutheran	605,510	2.0
	Mennonite	188,295	0.6
	Presbyterian	409,430	1.4
	United Church	2,834,435	9.6
	All other Protestant	1,839,715	6.2
	Greek Orthodox	214,995	0.7
	Ukrainian Orthodox	32,685	0.1
	Buddhist	300,050	1.0
	Hindu	297,115	1.0
	Jewish	329,925	1.1
	Muslim	579,375	2.0
	Sikh	278,265	0.9
	All other religions	1,127,430	3.8
	No religious affiliation	4,880,820	16.5

Notes:

[1] The figures in this table are derived from Agriculture-Population Linkage 20 percent sample data, which have been weighted up to represent the entire population.

[2] In 1991 and 2001, responses to the religion questions included a write-in circle for "No religion." This format may result in slight historical differences when comparing data on religion with censuses prior to 1991.

Source: Statistics Canada (nd-b).

APPENDIX B: CANADA, RELIGIOUS AFFILIATION, 2001

	Population		
	[illegible] Units		
Geographic	Religion	Number of Persons	Percentage
CANADA	Total number of persons	[illegible]	100.0
	Roman Catholic	[illegible]	[illegible]
	Ukrainian Catholic	[illegible]	[illegible]
	Anglican	[illegible]	[illegible]
	Baptist	[illegible]	[illegible]
	Lutheran	[illegible]	[illegible]
	Mennonite	[illegible]	[illegible]
	Presbyterian	[illegible]	[illegible]
	United Church	[illegible]	[illegible]
	All other Protestant	[illegible]	[illegible]
	Greek Orthodox	[illegible]	[illegible]
	Ukrainian Orthodox	[illegible]	[illegible]
	Buddhist	[illegible]	[illegible]
	Hindu	[illegible]	[illegible]
	Jewish	[illegible]	[illegible]
	Muslim	[illegible]	[illegible]
	Sikh	[illegible]	[illegible]
	All other religions	[illegible]	[illegible]
	No religious affiliation	[illegible]	[illegible]

[illegible]

[illegible]

[illegible]

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Note: Unless otherwise noted, all URLs were confirmed on October 6, 2005.

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Family Law Act, 1975 (Aust.), s. 6.

Hindu Marriage Act, 1955 (India).

Immigration Act 1988 (U.K.), c. 14, s. 2.

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Private International Law (Miscellaneous Provisions) Act (U.K.), 1995, ss.5-8.

Tax Credits (Polygamous Marriages) Regulations 2003 (U.K.), No. 743, s. 50.

ENDNOTES

[1] *Lee v. Lau*, [1967] P. 14.

[2] *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 [*Hyde*].

[3] *Sowa v. Sowa*, [1961] 1 All. E.R. 687 (C.A.); Castel and Walker (2001: §16.6).

[4] *Qureshi v. Qureshi*, [1971] 1 All E.R. 325; Castel and Walker (2001); U.K. Law Commission (1968: 9-10).

[5] Ibid.

[6] *Kerr v. Kerr*, [1952] 4 D.L.R. 578 (Man. C.A.); *Rae v. Rae*, [1944] 2 D.L.R. 604 (Ont. C.A.); *Douglass (otherwise Hodgins) v. Hodgins* (1957), 7 D.L.R. (2d) 57 (Ont. H.C.).

[7] See, for example, Utah Attorney General (2005). This report discusses problems arising in fundamentalist Mormon groups in North America, including the group in Bountiful, British Columbia.

[8] *Sinha Peerage Claim* (1939), [1946] 1 All E.R. 346n; *Cheni (otherwise Rodriguez) v. Cheni*, [1962] 3 All E.R. 873 [*Cheni*]; *Parkasho v. Singh*, [1967] 1 All E.R. 737.

[9] *Ali v. Ali*, [1968] P. 564 [*Ali*]; *Mirza v. Mirza* (1966), 110 Col Jo. 708; *Sara v. Sara* (1963), 36 D.L.R. (2d) 499 (B.C.C.A.) [*Sara*]; *Re Hassan and Hassan* (1976), 69 D.L.R. (3d) 224 (Ont. H.C.J.) [*Re Hassan*]; *R. v. Sagoo*, [1975] 2 All E.R. 926 (C.A.).

[10] *Sara*, ibid.

[11] *Re Urquhart Estate* (1990), 74 O.R. (2d) 42 (H.C.). Article 75 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, article 75 provides: "The domicile of a person, for the exercise of his civil rights, is at the place of his principal establishment." Castel and Walker (2001: §4.1-4.19g) provided a helpful summary of the common-law concept of domicile, the problems with the doctrine, proposals for reform, and statutory provisions governing domicile in Manitoba and Quebec.

[12] China, for example, banned polygamy in 1950. The current prohibition is embodied in article 2 of the *Marriage Law of the People's Republic of China*, 1980, as amended on 28 April 2001.

[13] *Hindu Marriage Act*, 1955, s. 11; Singh (1997: 237-277).

[14] See, for example, Mahiueddin (1997: 16-17).

[15] Nasir (1995: 25). The Iran census of 1976 indicated that the ratio of men with two or more wives to those with only one wife was 11 to 1,000 (Aghajanian 1986: 750).

[16] For a helpful overview of the laws and socio-cultural conditions of countries in which polygamy is legal, see the Emory University Islamic Family Law Web site <http://www.law.emory.edu/IFL/>.

[17] Alexander (1987); Alexander et al. (1979: 402) as discussed and cited in Sanderson (2001) and in Kanazawa and Still (1999).

[18] Betzig (1986) as discussed and cited in Sanderson (2001) and Kanazawa and Still (1999).

[19] MacDonald (1990: 195) as discussed and cited in Sanderson (2001) and Kanazawa and Still (1999).

[20] Sanderson (2001) citation omitted.

[21] Sanderson (2001: 332). A recent high-profile example is the marriage of the King of Swaziland to his 11th wife, who is pregnant with the King's 25th child (BBC 2005).

[22] See Alexander (1987) and Alexander et al. (1979).

[23] As discussed in Sanderson (2001: 333)

[24] Lord Kames (1796: 539) wrote that "polygamy sprang up in countries where women are treated as inferior beings: it can never take place where the two sexes are held to be of equal rank." Responding to "advocates for polygamy" who supported polygamy as a means to regain male superiority, 18th-century philosopher David Hume (nd: 108) argued that "this sovereignty of the male is a real usurpation, and destroys the nearness of rank, not to say equality, which nature has established between the sexes."

[25] UNCEDAW (1992: 1). Article 5(a) of the Convention provides: "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

[26] See, for example, Jennaway (2002: 140-142).

[27] Little and Price (1967: 422) wrote that "notions of romantic love and the social aspirations of educated young West Africans largely explains that contemporary popularity of monogamous marriage." Islamic scholars as well associate companionate marriage with monogamy. In his classic treatise, "Woman and Her Rights," Ayatullah Muraza Mutahheri (nd) wrote:

> Monogamy (Practice of being married to only one woman at a time) is the most natural form of matrimony. The spirit of exclusive relationship or individual and private ownership prevails in it, though this ownership is different from that of wealth or property. In this system the husband and

> wife each regard the feelings, sentiments and the sexual benefits of the other, as exclusively belonging to him or to her.

[28] Syed Mumtaz Ali, President of the Canadian Society of Muslims, was reported to have said that he "knows of some 'but not too many' Muslims who live in Canada with more than one wife but knows of no situation where the wives are unwilling, or unhappy, participants in the arrangement" (Cobb 2005). Researchers, however, have found that Muslim women living in polygamous marriages in North America are commonly unhappy, and that the addition of a second or third wife is typically very distressing to the "senior wives" and experienced as abusive or traumatic (Hassouneh-Phillips 2001: 735).

[29] See, for example, *Modernization of Benefits Act*, S.C. 2000, c. 12.

[30] See, for example, the *Children's Law Reform Act*, R.S.O. 1990, c.C.12, s.1(1), which provides that "for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside of marriage."

[31] *Brook v. Brook* (1861), 9 H.L. Cas. 193; Art. 3083 C.C.Q. Nationality rather than domicile is the relevant connecting factor in many civil law systems.

[32] In *Cheni*, supra note 8, the court ruled that an Egyptian marriage between an uncle and a niece that would have been within the prohibited degrees of consanguinity under English law would be recognized in England, saying at 883 that "it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilisation."

[33] *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285 [*Ali v. Canada*] at para. 7, applying *Tse*, infra note 37.

[34] For example, Australia's *Family Law Act*, 1975 (Austl.), which deals with children, property, support, divorce, annulment and other relief, provides in s. 6 that, "[f]or the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage." See also U.K. Law Commission (1968: 4). See also *Private International Law Act, 1995* (U.K.), ss. 5-8; Australia Law Reform Commission (1992: 93-94).

[35] *Tse v. Canada (Minister of Employment & Immigration)* (1983), 144 D.L.R. (3d) 155 (F.C.A.) [*Tse*].

[36] *Radwan v. Radwan (No. 2)*, [1973] Fam. 35; *Kenward v. Kenward*, [1951] P. 124 (C.A.)

[37] *Private International Law (Miscellaneous Provisions) Act 1995* (U.K.), c. 42, e. 5.

[38] *Canada (A.G.) v. Canard*, [1976] 1 S.C.R. 170.

[39] *Criminal Code*, R.S.C. 1985, c. C-46, s. 290.

[40] *Bate v. Bate* (1978), 1 R.F.L. (2d) 298 (Ont. H.C.).

[41] Ibid.; *Divorce Act*, R.S.C. 1985 (2d Supp.), c. 3, ss. 2 and 8.

[42] See, for example, *Family Law Act*, R.S.O 1990, c. F.3, ss. 1 and 29.

[43] Supra note 2.

[44] Ibid. at 138.

[45] [1948] 2 D.L.R. 353 (B.C.S.C.) [*Lim*].

[46] (1924), 33 B.C.R. 109 (C.A.).

[47] *Lim*, supra note 48.

[48] Ibid. at 358.

[49] *Re Hassan*, supra note 9.

[50] The definition of "spouse" for all purposes of Ontario's *Family Law Act*, supra note 44, s. 1(2), includes a party to "a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid." In regard to the other province and territories, see *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 1; *Family Law Act*, S.P.E.I. 1995, c. 12, s. 1(1); and *Family Law Act*, S.N.W.T., 1997, c. 18, s. 1(2), as am. by S.N.W.T. 2002, c.6, s.2(2).

[51] See, for example, *Family Relations Act*, R.S.B.C. 1996, c. 128, s.1.

[52] Ontario's *Family Law Act*, supra note 61, s. 1(2); The Yukon's *Family Property and Support Act, supra* note 69, s. 1; The Northwest Territories *Family Law Act,* supra note 69, s. 1(2).

[53] Ontario Law Reform Commission (1969-1975). Ontario, Legislative Assembly, Official Report of Debates (Hansard) (March 7, 1978: 436-56), (March 9, 1978: 549-71, (March 16, 1978: 743-770).

[54] *The Family Property Act*, S.S. 1997, c. F-6.3, s. 2(1); *The Family Property Act*, C.C.S.M., c. F25, s. 1(1).

[55] *Peter v. Beblow*, [1993] S.C.R. 980.

[56] Ibid.

[57] *Nowell v. Town Estate* (1999) 35 O.R. (3d) 415 (C.A.). appeal to S.C.C. discontinued, [1997] S.C.C.A. No. 642.

[58] *Divorce Act*, supra note 60 at s. 2(1).

[59] Supra note 2.

[60] See, for example, U.K. Law Commission (1968).

[61] *Orford v. Orford* (1921), 49 O.L.R. 15 (H.C.); *Kahl v. Kahl*, [1943] O.W.N. 558 (H.C.); *Gaveronski v. Gaveronski* (1974), 45 D.L.R. (3d) 317 (Sask. Q.B.); *Droit de la Famille – 1005*, [1986] R.D.F. 78 (C.S.Q).

[62] In *M.M. v. J.H.* (2004), 247 D.L.R. (4th) 361 (Ont. Sup. Ct. J.), the court ruled that parties to a same-sex marriage are included in the definition of "spouse" in the *Divorce Act*. In *P. (S.E.) v. P. (D.D.)*, 2005 Carswell BC 2137 (Sup. Ct.), "adultery" was interpreted to include a sexual relationship with a third party of the same sex.

[63] *Bibi v. Chief Adjudication Officer*, [1997] UKSSCSC CG_41_1994 (25 June 1997).

[64] *The Tax Credits (Polygamous Marriages) Regulations* 2003 (U.K.), No. 743, s. 50.

[65] *Ali v. Canada*, supra note 35.

[66] See *Immigration Act 1988* (U.K.), c. 14, s. 2. In regard to the European Union generally, see EC, *Council Directive 2003/86/EC* [2003] O.J.L. on the right to family reunification, ch.2, article 4, para. 4, which provides: "in the event of polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorize the family reunification of a further spouse." In regard to the United States, see U.S., Department of State (nd), which provides: "In cases of polygamy, only the first spouse may qualify as a spouse for immigration." In regard to Australia, see Department of Immigration and Multicultural and Indigenous Affairs (nd). In New Zealand, the relevant document is NZ (nd).

[67] Supra note 48.

[68] R.S.C. 1985, c.I-2, s.19(1)(d)(i).

[69] 1999 CanLII 7392 (F.C.J.).

[70] Ibid. at para. 17. Note that this case was decided under the former *Immigration Act*. The regulations to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, provide that marriage "as in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law." *Immigration and Refugee Protection Regulations*, SOR/2002-227 at s. 2. Section 5 of the regulations provides:

> For the purposes of these Regulations, a foreign national shall not be considered
> (*a*) the spouse or common-law partner of a person if the foreign national is under the age of 16 years; or
> (*b*) the spouse of a person if
> (i) the foreign national or the person was, at the time of their marriage, the spouse of another person, or
> (ii) the person has lived separate and apart from the foreign national for at least one year and is the common-law partner of another person.

[71] Parkinson (1994: 501) quoting from Devlin (1965).

[72] See, for example, Parkinson (1994).

[73] *Criminal Code*, supra note 41 at s. 293.

[74] Section 293 itself does not apply to adultery; see Raney (1898) who states: "In *The Queen v. Liston* (unreported), tried at the Toronto Assizes in 1893, Chief Justice Armour held that section 278 [predecessor to the current s. 293] of the Code, which is the only section which it could be argued covers adultery, was intended to apply only to Mormons." See also *R. v. Eastman* (1932), 58 C.C.C. 218 at 229 and *R. v. Tolhurst* (1937), 38 C.C.C. 319. Nor does s. 293 apply to unmarried cohabitation: *R. v. Labrie* (1891), 7 M.L.R. Q.B. 211 (Que. C.A).

[75] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[76] *Criminal Code*, supra note 41 at s. 293.

[77] Charter, supra note 78 at s. 32(1)(a).

[78] Parties to plural unions might wish to conceal their relationship, because of the potential criminal sanctions. Particularly problematic is that women might be discouraged from seeking spousal support or other relief out of fear that doing so may lead to criminal proceedings against the father of their children and the economic provider of the household.

[79] Charter, supra note 78.

[80] *Syndicat Northcrest v. Anselem*, 2004 SCC 47 at para. 39.

[81] Ibid. at para. 48.

[82] Ibid. at para. 51.

[83] Ibid. at para. 52.

[84] Ibid. at para. 59 (emphasis in original).

[85] Charter, supra note 115.

[86] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-9.

[87] Ibid. (emphasis in original).

[88] *Reynolds v. United States*, 98 U.S. 145 (1878) at 167-8. With respect to the relationship between polygamy and bigamy in the U.S., see "Bigamy," 10 Am. Jur. 2d, 967 at 969-70, which stated: "At common law, entering into a second marriage while the first remained undissolved was designated as polygamy, but the terms bigamy and polygamy are now used interchangeably."

[89] *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211; *R. v. Labrie*, supra note 76; *R.. v. Liston* (1893) (Toronto Assizes, unreported) as mentioned in Raney (1898); *The Queen v. "Bear's Shin Bone"* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *The King v. John Harris* (1906), 11 C.C.C. 254 (Que.); *Dionne v. Pepin* (1934), 72 C.S. 393, 40 R. de Jur. 443 (Que. S.C.); and *R. v. Tolhurst*, supra note 76.

[90] *R. v. Labrie,* ibid.; *R. v. Liston* , ibid.; *Dionne v. Pepin,* ibid.; and *R. v. Tolhurst*, ibid.

[91] *In the Matter of the Criminal Code, 1892, Sections 275-276, Relating to Bigamy*, (1897) 27 S.C.R. 461 at para. 41.

[92] Bartholomew (1958) citing Burn's *Ecclesiastical Law* (1842), Vol. 2, 9th ed., "Concerning marrying again, the former husband or wife being living, see title Polygamy" at 433aaa; as well as the *Statute de Bigamis* (1276) 4 Edw.1.

[93] *An Act further to amend the Criminal Law*, S.C. 1890, c. 37, s. 11 (1890). Bigamy already was a felony: see *An Act respecting Offences relating to the Law of Marriage*, R.S.C. 1885, c. 161, s. 4.

[94] *Criminal Code,* S.C. 1892, c.29, s. 278.

[95] Gordon (2002); *An Act to Amend Section 5352 of the Revised Statutes of the United States in Reference to Bigamy and for Other Purposes* (1882).

[96] House of Commons Debates (1890: 3162-63) (Sir John Thomson).

[97] Ibid. at 3163.

[98] *Criminal Code*, S. C. 1953-54 , c. 51, s. 243.

[99] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

[100] *R. v. Zundel*, [1992] 2 S.C.R. 731.

[101] Ibid. at 761.

[102] Hogg (1997: 35-23), referring to *R. v. Big M Drug Mart Ltd.*, supra note 101.

[103] See, for example, Gordon (2002); Bennion (1998); Altman and Ginat (1996); Kilbride (1994).

[104] *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199.

[105] *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

[106] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[107] *Schachter v. Canada*, [1992] 2 S.C.R. 679.

[108] Charter, supra note 77 at s. 2(a).

[109] *Vallomattom v. Union of India*, 2003 SOL Case No. 388 (Supreme Court of India).

[110] *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46.

[111] *Reference re Same-sex Marriage*, [2004] 3 S.C.R. 698 at para. 22 [*Marriage Reference*].

[112] *Hyde,* supra note 2.

[113] *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.); *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.); *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Que. C.A.).

[114] *Marriage Reference,* supra note 113.

[115] See, for example, Csillag (2005: L10).

[116] *EGALE,* supra note 184; *Halpern,* supra note 115; *Hendricks,* supra note 115.

[117] Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes,* 1st Sess., 38th Parl., 2004-2005, cl. 2 which provided: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." This Bill was the subject matter of the *Reference re Same-sex Marriage*, [2004] 3 S.C.R. 698.

[118] *Divorce Act*, supra note 43.

[119] *Immigration and Refugee Protection Regulations*, supra note 72 at s. 5.

[120] Charter, supra note 77.

[121] *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307.

[122] Charter, supra note 77.

[123] *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 (citizenship); *Miron v. Trudel*, [1995] 2 S.C.R. 418 (marital status).

[124] Discrimination on the basis of national or ethnic origin was argued in *Lavoie v. Canada*, 2002 SCC 23, but justified under s. 1. Discrimination on the basis of religion was unsuccessfully argued in *Re Bill 30 (Ontario Separate School Funding)*, [1987] 1 S.C.R. 1148 and in *Adler v. Ontario*, [1996] 3 S.C.R. 609.

[125] Ayatullah Muraza Mutahheri (nd). Known as the *talaq*, this is often described as the husband's unilateral right to divorce by oral declaration.

[126] al-Hibri (1997: 13) explained: "Justifications for granting the wife judicial divorce include the presence of defects in the husband, insanity, harm, prolonged absence, sexual abandonment, cessation of maintenance and imprisonment of the husband." Missing from this list is divorce at will.

[127] A precedent for ordering rectification of a legislative omission is *Vriend v. Alberta*, [1998] 1 S.C.R. 493, in which the Supreme Court of Canada ordered Alberta's human rights code be rectified by adding "sexual orientation" as a prohibited grounds of discrmination.

[128] *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 39.

[129] *Halpern*, supra note 115 at para. 117, substituting "monogamous" for "opposite-sex" in the original.

[130] *Halpern*, ibid., substituting "religious polygamists" for "same-sex couples" in the original.

[131] *Singh v. Canada*, [1985] 1 S.C.R. 117 at 118-9, Wilson J.

[132] *Nova Scotia v. Martin*, 2003 SCC 54, paras. 109-110.

[133] *Figueroa v. Canada*, 2003 SCC 37, para. 66.

[134] *Oakes*, supra note 88 at 138-9.

[135] Shachar (2000: 385-386). See also Shachar (2001).

[136] House of Commons Debates (January 30, 2003) at 1050 (Ms. Nathalie Des Rosiers).

Separate and Unequal:
The Women and Children of Polygamy

By

The Alberta Civil Liberties Research Centre

ABSTRACT

Polygamy is illegal in Canada pursuant to s. 293 of the *Criminal Code of Canada*. However, a polygamous community thrives in Bountiful, British Columbia and, to date, nobody from the community has been prosecuted for violating s. 293. Justice officials in British Columbia say prosecuting s. 293 would invite a defence challenge to the section's constitutionality, based on the argument that the section infringes the guarantee to religious freedom as set out in s. 2(a) of the *Canadian Charter of Rights and Freedoms*. However, an analysis of the practice of polygamy in Canada, and how it undermines the equality rights of women and children, suggests that even if s. 293 impinges on religious freedom, such a limit is justified, because of the inherent harms polygamy engenders for the women and children of polygamous families.

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EXECUTIVE SUMMARY

According to s. 293 of the *Criminal Code of Canada*, it is illegal for people to practise polygamy, which is a type of matrimonial or conjugal union involving multiple spouses. Under s. 293, not only is any form of polygamy illegal, but any type of polygamous union that *purports* to result from a rite of polygamy is illegal. Despite this prohibition, there is a community of polygamists in British Columbia called Bountiful which, to date, the authorities in British Columbia have refrained from prosecuting. This community practises polygyny (the men having more than one wife). The apparent rationale for the non-prosecution of polygamy practised by Bountiful members has been a belief that s. 293 would not withstand a challenge under the freedom of religion provision, s. 2(a), of the *Canadian Charter of Rights and Freedoms*.

This paper analyzes whether the anti-polygamy provision in the *Criminal Code* could be argued to impinge on the freedom of religion of the residents of Bountiful and whether the harms associated with polygamy are significant enough to justify a limitation on freedom of religion. The paper is divided into two major sections. Part I briefly addresses the historical and current practice of polygamy. The fundamental principles that underlay this paper's analysis are also identified (i.e., rule of law, equality and the prevention of harm).

Part I briefly addresses the history of polygamy, with emphasis on the North American context. While polygamy is practised in many countries throughout the world, as practised in Bountiful, polygamy creates a potential conflict between two very important values in Canada: individual freedom of choice and formal equality. These normative values are embedded as rights in the Charter. While it may be argued that an individual has the right to live a polygamous lifestyle, the practice may harm women and children's formal equality to such an extent that it should be prohibited.

To further elaborate on the harm associated with polygamy, Part I also examines the social and legal implications of de facto or full legal recognition of polygamy. The de facto recognition of polygamy, let alone formal legalization of the practice, would invite a situation that carries the potential for enormous challenges in terms of rewriting a whole array of laws that include how property is divided on marital breakdown, child custody and support, and the devolution of property on the death of a spouse.

Part I also looks at the implications of not prosecuting polygamy in light of the equality provision of the Charter, subs.15(1), and addresses whether the practice of polygamy is inherently harmful from the perspective of the equality rights of women and children. We conclude that by not prosecuting s. 293 of the Code, justice officials are in effect complicit in denying women and children living in polygamous families in Bountiful their full rights as citizens. The effect of not prosecuting s. 293 would seem to be, arguably, a de facto acceptance of polygamy by the authorities responsible for the enforcement and administration of justice.

To prosecute under s. 293 would necessarily entail difficulty from an evidentiary perspective. However, not prosecuting the offence under s. 293 means justice authorities are complicit in permitting some women and children in Canada to live in conditions where they are effectively being denied their full equality rights as guaranteed by the Charter.

In the case of Bountiful, the practice of polygamy seems to fall within the scope of freedom of religion. How freedom of religion has evolved as a constitutional right in Canada is discussed in Part II. The evolution of the concept is traced through competing lines of judicial decisions. What emerges is a right that, although of fundamental importance, is not without limits. Canadian jurisprudence has identified three possible bases for limiting the right to espouse and practise a religion freely:

- where that right otherwise conflicts with another right (e.g., equality under the law);
- where a religious practice may harm an individual or pose a threat to public order; and
- where the state can demonstrate a significant societal interest in limiting the right.

Part II concludes that the anti-polygamy provision trenches on freedom of religion. However, we also note that the Charter s. 1 analysis needs to be completed before we can say that s. 293 is unconstitutional.

Part II also discusses how contemporary courts might resolve a conflict between the right to equality under the law and freedom of religion. A tenable argument may be made that the Charter must be read in context as a whole document and there is, therefore, no hierarchy of rights. Thus, a court faced with a challenge to s. 293 under the Charter's freedom of religion clause would have to balance that right against the equality provisions in the Charter and reconcile these rights. In any event, if a court did decide that s. 293 impinged on religious freedom, it would also invariably undertake an analysis under s. 1 of the Charter with a view to deciding whether that limit on religious freedom was justified. A probable frame of reference in a section 1 analysis would be whether the anti-polygamy provision exists to prevent harm.

After carefully considering some of the complexities attendant to this issue, the authors conclude that s. 293 would likely survive a Charter s. 2(a) challenge.

INTRODUCTION

The appropriate legal response to the practice of polygamy in Canada presents great difficulty for justice officials and policy makers because there are no Canadian legal precedents that analyze the *Canadian Charter of Rights and Freedoms*[1] implications of anti-polygamy legislation in the *Criminal Code*.[2] In analyzing whether Canadian anti-polygamy legislation may offend the Charter, the authors have been obliged to look to the community of Bountiful, British Columbia which, to their knowledge is the only example of a community currently practising polygamy in Canada. While the situation in Bountiful does not necessarily reflect polygamous communities or societies in other parts of the world, it is the only apparent Canadian example and, as such, is used as a case study throughout this paper. While it is likely there are individuals in Canada who choose to live in polygamous arrangements, Bountiful is an entire community where this is the norm, and where the practice is justified on the basis of religious beliefs.

For many years, British Columbia's justice officials have refrained from prosecuting anyone for practising polygamy.[3] Yet, Bountiful represents, according to reports from some women and men who have broken away from the community and others who have studied the community, an example of an authoritarian, theocratic culture where many individual rights are so limited that they have little or no meaning when measured against the bundle of rights and liberties which other Canadians enjoy. Religious belief and rituals, family life, sexuality, education, business and social life are all monitored and controlled in Bountiful in accordance with the dictates of the leaders of a breakaway Mormon sect called the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) (BC 1993: 15).

As the Alberta Civil Liberties Research Centre is an organization concerned about *both* civil liberties and human rights, it is very important to us to endeavour to maintain a neutral position when analyzing these difficult issues. In particular, we believe freedom of religion must be accorded its due respect and strength in Canada. On first blush, we might have concluded that polygamy is a personal choice for the individuals who live in Bountiful and thus one with which the state should not interfere. Nevertheless, a compelling argument may also be made that in some cases, essential rights and freedoms may be limited when their exercise infringes public safety, the personal safety of others or causes other real harms. This paper analyzes whether Canada's anti-polygamy legislation infringes freedom of religion and whether there are significant harms-based concerns that could justify a limitation, such as a criminal prohibition of polygamy.

This paper addresses three issues.

- What are the implications related to the legal and social status of women if governments neither prosecute nor legalize polygamy?

- How does the non-prosecution of polygamy laws hinder the protection of women and children's equality rights?

- How does Canadian law deal with conflicting rights, such as freedom of religion and equality, under the *Canadian Charter of Rights and Freedoms*, in issues such as polygamy?

This paper is divided into two parts. In Part I, we briefly discuss the historical and current situation surrounding polygamy, with emphasis on the North American context and a particular focus on the community of Bountiful. Second, we identify the fundamental principles that inform the analysis in this paper: the rule of law, equality and the role of law in preventing harm. In addition, we briefly set out the current legal response to polygamy in Canada. Next, we examine the social and policy implications of non-enforcement of polygamy law on women and children's equality, with emphasis on the potential harms associated with polygamy.

In Part II, we examine whether anti-polygamy laws infringe freedom of religion under the Charter and how the courts would likely resolve a conflict between gender equality and freedom of religion in the context of anti-polygamy legislation.

I: HISTORICAL AND CURRENT CONTEXT OF POLYGAMY

Background

Polygamy is a structured marital relationship in which a spouse of one gender has multiple spouses of the other gender. Historically, by far the most common polygamous arrangement was where a male had several wives; this kind of polygamous practice is called polygyny, and is the one practised in Bountiful. Polyandry is the term used to describe an arrangement where a woman has several husbands. Although polygyny and polyandry have distinct meanings for anthropologists and historians, because the practice of polygyny was and is by far the more common arrangement of the two, polygamy has come to be used generically to describe any multi-spousal marital relationship and is the term used throughout this paper. Having said that, it must be pointed out that Bountiful limits its practice to polygyny.

While the Canadian community of Bountiful is used as a case study throughout this paper, it is important to note that in many parts of the world, polygamous societies exist and have existed for many centuries. The notion of a monogamous matrimonial union as the basis of family relationships is not universal. Polygamous societies are not aberrations. They have been common throughout history and across all cultures.

In North America, and in particular the United States, polygamy has come to be associated historically with adherents of the Church of Jesus Christ of Latter Day Saints, commonly known as Mormons. No summary of polygamy in North America would be complete without a look at its practice within the borders of Utah in the 19th century. Several thousand followers of the tenets of Mormonism decided to settle there after leaving behind hostile prejudice that sometimes took the form of violent, deadly persecution at the hands of their neighbours in the pre-Civil War United States. Prior to attaining statehood in 1896, the Territory of Utah, which had been a theocracy in everything but name, represented both a curiosity and a challenge for the American federal government. Apart from the Aboriginal inhabitants with their spiritual traditions, the majority of Utah residents adhered to a single religious faith, Mormonism, which was grounded in the belief that polygamous relationships represented the best and highest assurance of an eternal celestial afterlife (Krakauer 2003: 5-6). However, even though polygamy did enjoy the blessing of the elders of the early Mormon Church, and even when the practice was at its peak in mid to late-19th century Utah, the practice was not universal among the Mormon faithful, with only an estimated 20 percent of Mormons involved in polygamous family relationships (Iverson 1984: 505).

In any event, by the turn of the 20th century, due in no small measure to the fact that a condition for Utah's admission into the American republic as a state was that Mormons officially renounce polygamy as an article of faith, the official Church of Jesus Christ of Latter Day Saints had abandoned polygamy as church doctrine (Nedrow 1981: 314). However, a minority of strict fundamentalists disagreed with this new official stance regarding polygamy and eventually seceded from the mainstream church to establish their own religion — the FLDS. Although retaining many of the beliefs of the mainstream Mormon Church, leaders of the breakaway sect and their faithful followers continued to hold fast to the practice of polygamy as they set out to build a religious institution through a network of isolated rural communities and settlements in the United States, Canada and Mexico. Belief that a man could achieve immortal godhood and that his status in the afterlife, as his status on earth, depended on acquiring several wives and propagating a large number of children, was and is a defining feature of the FLDS faith.

The modern North American FLDS male polygamist has learned to adopt the public trappings of lawful civil marriage, being legally married to only one woman, while abiding by an entirely different set of rules and beliefs that serve to buttress his complex array of relationships and camouflage this array from public scrutiny. Polygamous adults in FLDS communities simply live together under one roof without being legally married, with private, secret religious ceremonies marking these unions as binding commitments in the minds of the participants (Nedrow 1981: 314-320). That is certainly the situation in the FLDS community of Bountiful, British Columbia where married males have only one spouse as defined by civil law (BC 1993: 28). The other "wives" occupy status as "celestial wives," committed to their one "husband" by way of a religious rite known as "sealing."[4] Furthermore, the FLDS faithful in Bountiful and in the other FLDS communities in the United States and Mexico are expressly told by their church leaders that obedience to the religious rules governing the various aspects of their lives is more important than obedience to the secular laws of the countries in which they dwell (BC 1993: 28). Finally, the private ownership of property, which is arguably one of the features not only of a modern democracy's economic system but also its political system, is discouraged for adherents of the FLDS religion. The leaders of the FLDS manage a large trust called the United Effort Plan (UEP), which crosses international borders and is managed from the Church's Utah headquarters. Members of the various FLDS communities have been urged to deed their land and homes to this trust (BC 1993: 7-8).

Legal Response to Polygamy

This section addresses the current criminal and civil laws in Canada which deal with polygamy and the international laws that affect Canada's obligations in this regard.

Criminal

Polygamy is illegal in Canada under section 293 of the Code. This section states:

> **Polygamy**
> **293.** (1) Every one who
> (*a*) practises or enters into or in any manner agrees or consents to practise or enter into
> (i) any form of polygamy, or
> (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or

> (*b*) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (*a*)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> **Evidence in case of polygamy**
>
> (2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.[5]

There is a related criminal offence called bigamy, where one married person goes through a form of marriage with another person, which is prohibited under Code s. 290. People have been prosecuted under this section on a number of occasions.[6]

In addressing the legal approaches to polygamy, some have argued that adultery is a similar activity, yet it is not subject to the criminal law in Canada. Nor is the situation where an individual is married but separated and enters into a subsequent common-law relationship without divorce. Indeed, courts have concluded that the Code anti-polygamy provision does not apply to adultery, even when those who are committing adultery are co-habiting.[7] This is because the individuals involved do not purport to be entering into a form of marriage.

While polygamy is illegal, prosecution of the practice of polygamy per se can be an exercise fraught with difficulty, as one notorious example from the United States shows. The United States is home to an estimated 50,000 to 60,000 practising polygamists, the majority of whom are members of the FLDS religion. By far, the largest number of people practising polygamy live in communities in Utah and Arizona, with the most well-known community being that of Colorado City, a predominantly polygamous town of about 5,000 residents that lies on the border between Arizona and Utah. Colorado City used to be a small, isolated farming community known as Short Creek and it was here, one day in late July of 1953 that a mass arrest of FLDS adults occurred. The entire community, with the exception of five adults and the community's 236 children, was charged with criminal conspiracy and polygamy (Gripman 2001). The children were taken into protective custody by the State of Arizona and assigned to various foster homes. State prosecutors subsequently reached a plea bargain agreement with 26 of the men who agreed to plead guilty to "open and notorious cohabitation" and were subsequently released on one year's probation. The majority of the community's children were returned to their parents' care after several lengthy court battles. The raid proved to be a public relations disaster for the authorities in Arizona, particularly the governor who had authorized the raid and who subsequently went down to defeat in the next election.

Notwithstanding the difficulties which American authorities have faced in securing convictions of polygamists in the past, there have been some recent cases, including the conviction of an FLDS man in Utah in 2003 on counts of rape, criminal non-support and bigamy. Thomas Green became engaged to his 12-year-old stepdaughter in 1985 and then "celestially" married her according to the rites of the fundamentalist Mormon religion after the girl reached her 13th birthday. She subsequently conceived a child who was born four months after her 14th birthday. Later on, in an unsuccessful bid to avoid charges of child molestation, Green married the girl when she was of legal age to consent to marriage, in accordance with Utah law. In a 2005 decision, the Utah Supreme Court upheld Green's conviction for statutory rape of a child.[8] In an earlier decision, the Utah Supreme Court had upheld on appeal Green's convictions for criminal non-support and four counts of bigamy.[9] In this case, Green had unsuccessfully tried to get around Utah's law against being married to more than one person at a time by avoiding being in more than one licensed marriage at a time. Green, who had one lawful wife and three "celestial wives," would divorce one woman and then marry another while continuing to maintain his "celestial relationship" with the woman he had divorced.

Civil

While there are criminal prohibitions against polygamy contained in s. 293 of the Code, there is a somewhat modified approach to polygamy under civil law. Canadian courts have historically and for very limited purposes recognized the validity of foreign polygamous marriages by applying conflict of laws rules regarding marriage. In brief, so long as the parties to a marriage in a foreign jurisdiction had legal capacity and were married in accordance with the marriage laws of that jurisdiction, the marriage will be declared valid in Canada for certain purposes. The passing of property from a deceased person to an heir by way of a will is one of them. For example, in the 1923 decision of *Yew v. British Columbia*,[10] the British Columbia Court of Appeal reversed a lower court's decision that had denied the marital status of the two Chinese widows of a deceased Canadian resident. The deceased had left instructions in his will to pay an annuity from his estate to each widow. At issue was whether the annuities would be levied a duty at the rate for married persons in accordance with applicable British Columbia law of testate succession or whether they would be subject to a higher rate. A lower court had denied the marital status of the two women on the grounds that their respective unions were not marriages within the definition of marriage according to Canadian law. However the Court of Appeal found that because the deceased had married the two women in China while he was still a citizen of China and because Chinese law at the time permitted polygamous marriages, the two women were lawful spouses of the deceased such that they were entitled to have their annuities taxed at the lower rate.

Our courts have also not hesitated historically to recognize foreign polygamous marriages in certain cases when the applicants for admission to Canada were children. For example, the Federal Court of Appeal in 1983 overturned a decision of the Immigration Appeal Board that had denied a father's application to sponsor for admission into Canada his three children. The children were born in Hong Kong while the man was resident there and married to two women. Polygamous marriage being lawful in Hong Kong, the Court of Appeal held there was no question as to the status of the children such that they could be admitted into Canada pursuant to their father's sponsorship application.[11] Nor would a Canadian court deny relief in a case involving a potentially polygamous foreign marriage when matrimonial relief under Canadian law was at issue. In a 1976 decision arising out of

Ontario, the Ontario High Court of Justice had to consider the legal status of a marriage performed in Egypt in accordance with the matrimonial rites of Islam.[12] A husband and wife, both Canadian citizens, married in Egypt in 1962 and subsequently immigrated to Canada. The husband purported to have received a divorce in 1974 from the Egyptian Consul in Montréal in accordance with the rites of Islam. The wife rejected the "divorce" as being invalid in accordance with Canadian law and petitioned for support under a valid marriage. The husband took the view that because the Egyptian marriage was potentially polygamous, Canadian courts and laws had no jurisdiction, and thus his wife was not entitled to any support. The court applied the conflict of law rules regarding marriage and found the Egyptian marriage to be valid, so when the couple immigrated to Canada, their marriage became subject to Canadian law such that the law of Ontario would apply to grant matrimonial relief to the separated wife.

However, our courts have not permitted people who immigrate from other countries to continue to practise polygamy. In 1998, an immigration officer denied an application for permanent residency from a Palestinian man who had married two women in Kuwait and had fathered five children between the two women. The man applied for a judicial review of the decision, and the review was granted. However, the court reviewing the matter upheld the decision of the immigration officer, declining to reject the officer's finding that the man and his two wives would practise polygamy in Canada once they became permanent residents.[13] Moreover, current federal legislation prohibits sponsorship of a foreign national by a Canadian resident, where the foreign national is the sponsor's spouse and the sponsor was, at the time of the marriage, married to another person.[14]

Canada's approach is consistent with that of the United Kingdom, which has faced enormous challenges over the past few decades in terms of accommodating the needs of large numbers of immigrants from Africa and the Middle East, many of whom originate from countries where polygamous unions are not uncommon and indeed, in many sub-Saharan African countries, constitute up to half of all matrimonial unions (Wing 2001). English courts also apply conflict of laws rules to recognize the validity of foreign polygamous marriages for certain purposes. English law also continues to prohibit polygamy for residents of the United Kingdom (Martin 1994: 424-426). However, the prohibition against polygamy has been the subject of legal challenges and lobbying by traditionalist Muslim groups. Traditionalist Muslims have advanced the proposition, albeit so far without success, that the *European Convention on Human Rights*[15] can be used to support legalizing polygamy in Britain. According to Article 8 of the European Convention, "everyone has the right to respect for his private and family life, his home and his correspondence." Traditionalist Muslims support a broad interpretation of this Article. They argue that since polygamy is a practice that is part of the religious and cultural heritage of thousands of British Muslims, respect for private and family life should entail legal recognition of a right for polygamous Muslims to sponsor the admission of second and even subsequent wives into the United Kingdom. However, that argument has not succeeded to date before the European Human Rights Commission, which has ruled that Britain's immigration laws against bringing more than one spouse into the country do not violate the Convention (Wing 2001: 856). Indeed, in accordance with Article 8(2) of the Convention, a state has the right to enact laws concerning family life to protect the rights and freedoms of others. This approach is consistent with the rulings of United Kingdom courts which apply conflict of laws rules so foreign polygamous marriages are recognized for some, but not all, purposes (e.g., inheritance). The check against an encompassing recognition of foreign polygamous unions is that the courts refuse to recognize any legal relationship created under a foreign law that would offend the fundamental public policy of Britain (Martin 1994: 443).

International Laws

Canada's obligations under international law also must be examined. Canadian courts look to the international human rights instruments Canada is bound by to provide guidance as to the interpretation and application of the Charter. In the context of interpreting and applying the human rights of the Charter, the Supreme Court of Canada clearly stated that customary and conventional international law is both useful and relevant. The Supreme Court of Canada also stated that various sources of international human rights law, including customary norms, must be relevant sources when interpreting Charter provisions.[16]

Canada is subject to a number of international human rights laws that may pertain to polygamy or its associated activities. The *Convention on the Rights of the Child*[17] Article 34 instructs states to "protect children from all forms of sexual exploitation and sexual abuse." It also provides that states must take all measures to prevent "the inducement or coercion of a child to engage in unlawful sexual activity." The underage sexual activity alleged to be occurring in Bountiful should therefore be subject to all efforts of prevention by our government.

In addition, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)[18] provides in Article 16 that states must "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

> (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

In 1994, the Committee on the Elimination of Discrimination against Women passed General Recommendation 21, which says the following about polygamy.

> Polygamous marriages
>
> 14. States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.

Article 5(a) deals with elimination of prejudices related to gender inferiority or superiority. Clearly, the United Nations Committee on the Elimination of Discrimination against Women has determined that polygamy should be prohibited. Thus, because Canada has signed and ratified these conventions, at minimum, these recommendations should be influential when interpreting rights such as equality under subs. 15(1) of the Charter.

Equality

Having summarized the history and current reality of polygamy with a focus on the North American context, and the current applicable laws, we now define and discuss some key principles that are relevant to our legal analysis.

Our human rights laws reflect key legal and social values of Canadians. One important value is the tolerance of, and respect for, the religious practices and beliefs — or non-beliefs — of all people. Freedom of religion is guaranteed and protected by s. 2(b) of the Charter. Canadians also enjoy the right to equal treatment under the law by virtue of subs. 15(1) of the Charter. Formal equality between the genders has normative status as well under s. 28 of the Charter. Equality of treatment under the law is a precious thing and one of the most defining features of a modern, democratic society.

Personal autonomy is exercised in contemporary Canada within a legal, political and social framework that is informed by the normative values of equality before the law, accommodation of differences, and formal equality between the genders. These normative values have formal legal expression in ss. 15 and 28 of the Charter which, as part of Canada's Constitution, constitutes the highest source of law in the land. The notion of equality for all persons under and before the law may be a value that Canadians now take for granted. However, equality under the law has enjoyed a slow evolution, particularly for women and girls.

For example, the pledge of a marriage vow in an earlier time saw a woman lose her status, such as it was, and lose what few legal rights she might have otherwise had. On marriage, a woman was legally deemed to fall within the ambit of her husband's care and responsibility. This legal reality was common throughout the English-speaking democracies. So long as husbands provided their wives and families with the necessities of life and shelter, the courts were extremely reluctant, on both legal and policy grounds, to intervene in all but the most heinous instances of abuse or neglect (Golz 1995). The ethos of the day was that so long as activities in the so-called "private sphere" did not harm or threaten the peace and order in the public domain, the legal system should not intervene except in the most egregious situations of abuse or neglect.[19] That ethos of non-interference in how individuals conduct their private affairs continues to have validity as far as regulating the state's role in the private realm. In most cases, the trigger for state action and intervention continues to be when a harmful act is done to another person.

Gender equality rights have been enshrined under subs. 15(1) of the Charter.

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

There have been many decisions at the provincial appellate level, and at the Supreme Court of Canada, where impugned statutes have been examined through the lens of Charter subs. 15(1) in an effort to see whether a given statute offends the Charter's equality guarantee. However, the standard for analysis has been carved out by two particular decisions of the Supreme Court of Canada: *Andrews v. Law Society of British Columbia*[20] and *Law v. Canada*.[21] Orton (1990: 302) discussed the impact of the *Andrews* decision and noted the Supreme Court of Canada's approach to the constitutional right to equality, "because it is based on remedying disadvantage rather than treating likes alike, means that laws that have not benefited disadvantaged groups must now do so."

The *Law v. Canada* decision sets out an analytical framework in which the need for a contextual approach to equality rights is emphasized. In determining whether there has been discrimination under Charter subs. 15(1), there is no need to show any intention to discriminate against an aggrieved person or group claiming lack of equal treatment under the law. Instead, a court may find that equal treatment under the law has been denied to a person or group where there has been a "failure to accommodate circumstances of actual disadvantage" (Sharpe et al. 2002: 276). Essentially, for an individual or group to establish successfully that a law violates the equality provision in the Charter, such an individual or group would have to prove different treatment and discrimination based on one of the listed grounds in subs. 15(1) or an analogous ground. The analytical framework, as set out by the Supreme Court, is as follows.

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position

> within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?[22]

The purpose of subs. 15(1), as identified by our Supreme Court, is to foster a society in which citizens can rest confident that the law accords them equal respect and treatment without prejudice. Subsection 15(1) is supposed to operate as a guarantee against oppression, the purpose of which is to "remedy the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping."[23]

The right to gender equality is recognized in subs. 15(1). This is supported by s. 28 of the Charter which guarantees equality between the genders in the application of other Charter rights and freedoms.[24] In addition, a woman's fundamental right to equality before and under the law has been recognized in various international conventions and covenants to which Canada is a signatory.[25] Furthermore, at least one international agreement calls on all state-signatories to undertake initiatives designed to remove all prejudices and practices associated with stereotyped roles for men and women. According to Article 5(a) of the *Convention on the Elimination of All Forms of Discrimination against Women*,[26] state parties to the Convention must implement measures:

> to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (Mayer 2000-2001: 248).

Decisions of Canada's Supreme Court clearly established subs. 15(1) as the lens through which the courts must view any given argument that one's equality rights have been infringed upon. As Wilson, J. said in the decision of *McKinney v. University of Guelph*:

> In other words, s. 15 is, in effect, declaratory of the rights of all to equality under the justice system so that, if an individual's guarantee of equality is not respected by those to whom the *Charter* applies, the courts must redress that inequality.[27]

What Canadian jurisprudence has established is that irrespective of an aggrieved person's claim that a law infringes on individual rights, a court examining that matter must take a "purposive and contextual approach to discrimination analysis."[28] Further, to find that a measure discriminates in a substantive sense, it is necessary that human dignity be impaired. The Supreme Court of Canada stated in *Law v. Canada*:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.[29]

Equality before the law is an important democratic value. If gender equality were at issue, claimants would be required to show, in a way that would attract a Charter remedy, that they experience and have experienced prejudice, stereotyping and historical ill treatment. In the case of polygamy, women would argue that permitting polygamy seriously threatens their "human dignity."

In *Law v. Canada*, the Supreme Court also set out four contextual factors to assist in determining whether human dignity is impaired, although the court indicates that this list is not exhaustive. The four factors as applied to the question of polygamy are:

- a pre-existing disadvantage;
- correspondence between the grounds and the claimants' actual needs, capacities or circumstances;
- an ameliorative purpose or effects on more disadvantaged individuals or groups in society; and
- the nature of the interest affected.

Pre-Existing Disadvantage

The Supreme Court noted that historical disadvantage does not automatically lead to a finding of discrimination, although it weighs in favour of that finding. Women and girls may be said to suffer social, political and economic disadvantage both currently and historically. In the context of Bountiful, the failure to prosecute polygamy reinforces inaccurate understandings of the merits, capabilities and worth of women and girls within Canadian society, perpetuating their disadvantage.

Correspondence between the Grounds and the Claimants' Actual Needs, Capacities or Circumstances

Women and children living in polygamous relationships and families in Bountiful are as deserving of legal protection and support as all other women and children in Canada. However, because polygamy is not being prosecuted, they are not receiving legal protection or support.

If Canadians choose to enter into relationships, these are usually monogamous.[30] Western societies have valued monogamy for a number of reasons. This is not to say that the monogamous union is not without its problems. For example, this family form has had negative results for First Nations women.[31] Clearly, the Canadian family is a "thoroughly gendered institution" that is "premised on a gendered division of labour that permeates every aspect of family life" (Majury 2002: 321). Traditional monogamous relationships, therefore, cannot be upheld as some paragon of equality because, particularly as history has shown, that decidedly has not been the case. A pre-Confederation era unmarried woman may have been deemed to enjoy an equal natural right to dignity along with her unmarried male counterpart. However, once she entered into marriage, whatever minimal rights she had, be they natural or civil, merged with those of her husband such that, insofar as the law regarded her, she had no legal personality (Golz 1995: 325). There were piecemeal changes to laws governing the matrimonial relationship beginning in the mid-19th century. For example, family law reform initiatives in Ontario expanded the rights of married women in areas like child custody and guardianship. Such minimalist reforms, though, were very much rooted in notions of Victorian era morality, informed by the notion of fault surrounding any act of female adultery committed irrespective of the circumstances that had led to it. Proof of female adultery would attract legal condemnation of a mother as being morally unfit and thus unworthy of legal custody of her children (Golz 1995: 326). The long march toward formal recognition of the equality between female and male persons in Canada arguably attained one of its highest points with the inclusion of s. 28 in the Charter. However, to appreciate just how far Canadian women have travelled, one need only look to the fact that it was not until 1929 that women attained the status of legal persons pursuant to the October 18, 1929 ruling of the judicial committee of England's Privy Council in what has come to be known as the "Persons Case."[32] The long evolution toward equality has been defined by individual stories of courage and perseverance in the face of public indifference or even worse.

A discussion of this evolution toward legal recognition of gender equality is beyond the scope of this paper. It is relevant for our discussion to recognize the historical evolution of the concept and to note that, as a result of numerous family law reform initiatives, at least a contemporary monogamous relationship does carry the *potential* for an equal sharing of the load associated with supporting children.

By contrast, the polygamous home involves a division of a husband's labour, time and resources among several wives and children. Children in many polygamous households essentially grow up in homes with a part-time father who can provide only transient support and parenting. While this may be the case for a number of lone-parent families or families in which one parent is away for long periods, and for whom having a part-time father does not create harm, polygamy as practised in Bountiful creates the situation where a large number of women and children depend economically and emotionally on one man. This arrangement can create emotional stress for women, stress which is further exacerbated if the family lives in poverty (Schnier and Hintmann 2001: 810). Moreover, it is common practice in polygamous unions of Bountiful for wives to have no right to choose potential mates (Schnier and Hintmann 2001: 821).

Ameliorative Purpose or Effects on More Disadvantaged Individuals or Groups in Society

This contextual factor has little relevance in the case of polygamy.

Nature of Interest Affected

As the majority of the Supreme Court of Canada noted in *M. v. H.*:

> The discriminatory calibre of differential treatment cannot be fully appreciated without considering whether the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group.[33]

The lack of prosecution of polygamy impacts on women and children of Bountiful and affects their interest in a profound way. A case might be made that the women and children involved in polygamous familial relationships are victims, and that by not prosecuting s. 293, justice officials are complicit in the preservation of subservient status for the women and children of polygamy. The issue was succinctly put in a 1993 report about Bountiful prepared for the British Columbia Ministry of Women's Equality (BC 1993: 13). "The situation of the Bountiful group poses the question: when does culture stop being culture and start being abuse?" If the leaders of a polygamous community like Bountiful are going to expect the court to accept the proposition that women choose to participate in a polygamous arrangement in which one man controls the decision making for a group of women and children, then for such a proposition to be accorded any respect a woman's choice must be freely made after she has considered various possibilities and outcomes. Arguably, however, such a choice could only be legitimate if it were the product of a system that encourages free thought and the exercise of rights to free speech and freedom of conscience. For a democracy to function effectively, citizens must develop the necessary skills and capacities to discern the policies and laws by which they might be governed. The educational and social structures of Bountiful though are hardly conducive to this kind of free exercise of individual will.

For all these reasons, the lack of prosecution of polygamy impairs the dignity of the women and children of Bountiful. And, thus, their equality under Charter s. 15(1) is at issue.

The Harm Principle in Canadian Law

In addition to equality, other important relevant values include the "rule of law" and the "harm principle." The rule of law is a fundamental feature of Canadian democracy. Its essential nature may be summed up as:

- nobody should be subject to the whim of political and legal authority acting without the sanction of law;
- everyone, including government officials, elected representatives and a country's political executive is subject to and equal before the law; and
- citizens need certainty about the law so they can freely live within the limits set by law (Tamanaha 2004: 34-35).

These limits, it must be noted, have been set by the majority of citizens expressing their will through our elected political representatives. Whatever the motivation a person might have for abiding by a given law, arguably the most important function that law as an institution plays in a democracy is that it permits maximum autonomy for individuals, subject only to the proposition that as we satisfy our individual needs and pursue our ambitions in life, we do not harm other people as they pursue their own needs and goals.

The harm principle, as developed by John Stuart Mill in 1869, is often referenced by the Supreme Court of Canada. In his essay, *On Liberty*, Mill sets out the principle that indicates the breadth of individual liberty and the limits of state intrusion on that liberty as

> [t]hat only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others" (Mill 1989: 13).

The harm principle has become an important feature of Canadian law; in particular, in the analysis of Charter s. 2(b) (freedom of expression) and in the Charter s. 7 right to "life, liberty and security of the person" (Levine 2004: 197). For example, in *R. v. Butler*,[34] a case about pornography, the majority of the Supreme Court of Canada adopted the Millian philosophy that only harm to others (in this case women and girls) could justify the infringement of personal liberty or freedom. The Supreme Court of Canada noted that the level of harm required to justify such an infringement is a "reasoned apprehension of harm," evidenced by a rational link between the criminal sanction and the objective.[35] Levine (2004: 199) noted that in the case law after *Butler*, three points about the harm principle became clear. First, the legislative objective of harm prevention was required to justify infringements of Charter rights. Second, the harm principle was important in the "fundamental justice" analysis in s. 7 and in the balancing approach used in a Charter s. 1 analysis. Finally, governments had an increasingly difficult task of providing evidentiary proof of harm when justifying legislation that limits Charter rights.

Recently, however, the Supreme Court of Canada rejected the harm principle as a "principle of fundamental justice" under Charter s. 7.[36] The *Malmo-Levine* case indicated that Parliament is entitled to deference on its decisions to criminalize behaviour, subject only to our constitutional rights.[37] That is, Parliament could pass criminal laws in the furtherance of legitimate state interests that were not limited to the avoidance of harm.[38] Further, the Court noted that the harm principle is "an important state interest" but not a normative "legal" principle.[39] The other issue noted by the Court is the lack of consensus about what constitutes harm in our society. Nevertheless, Levine (2004: 208) concluded that social values used to support criminal legislation will not pass s. 7 Charter scrutiny unless some harm is avoided.

What may constitute harm can be a source for lively debate and discussion. After all, one person's harmless pleasure may be regarded by another as an affront to morality and therefore deemed to constitute a social harm. However, amid the debate as to what may constitute harm, even persons of otherwise disparate viewpoints could come to agreement about certain actions that must undeniably constitute harmful acts. Within the voluminous body of Canadian law, one important document can rightfully be regarded as a uniform code of conduct for everyone: the *Criminal Code*. The Code contains numerous examples of prohibitions against various forms of conduct considered harmful to individuals or society. Even some of our most private conduct is the subject of prohibitions in the Code. For example, pursuant to s. 43, a teacher or parent may use physical means to discipline a pupil or child but that force cannot "exceed what is reasonable in the circumstances."[40] Another example is subs. 282(1), which makes it illegal for one parent to take and detain a child who has been the subject of a custody order that had granted custody to the other parent. A third example is the prohibition against incest as set out in s. 155 and which defines incest as sexual intercourse between blood relatives, a definition that includes half-brothers and half-sisters. These prohibitions — and there are many others in the Code — are neither capricious nor arbitrary. They reflect the minimum standards that reasonable people from across the political spectrum have agreed are necessary to ensure the social cohesion of a large and otherwise disparate citizenry. It should go without saying that this uniform code of conduct applies equally to all residents of Canada irrespective of gender, sexual orientation, ethnic origin, cultural background or religious belief. Indeed, while these prohibitions may limit some people in the practice of their religion, such limitations are seen as incidental, because the laws are of wide general application and they address harms.

It is quite proper and permissible for Parliament to choose the most appropriate method to deal with a harmful activity, even if there are other methods available. For example, in *RJR-MacDonald Inc. v. Canada (Attorney General)*,[41] the Supreme Court of Canada examined the issue of whether it was constitutional to address cigarette smoking, a harmful activity, by regulating the labels of cigarette packages, rather than by criminalizing smoking. The majority of the Supreme Court of Canada said:

> Once it is conceded, as I believe it must be, that tobacco consumption has detrimental health effects and that Parliament's intent in enacting this legislation was to combat these effects, then the wisdom of Parliament's choice of method cannot be determinative with respect to Parliament's power to legislate.[42]

In the same way, once it is conceded that polygamy is harmful and Parliament's intent in enacting criminal legislation is to combat its harmful effects, then the wisdom of Parliament's choice of method will not determine whether it has the power to legislate against polygamy.

The Supreme Court of Canada has said that although Parliament has chosen not to use criminal laws to address one harmful activity (e.g., tobacco smoking or alcohol consumption), this does not mean that Parliament cannot impose criminal sanctions on another similar one (e.g., marijuana use).[43] Thus, although adultery and similar activities may indeed be regarded as harmful, Parliament has chosen not to address these with criminal prohibitions, while imposing criminal penalties for polygamy, which Parliament also regards as sufficiently harmful to be criminalized, rather than dealt with under civil law or regulations.

Harms Associated with Polygamy

Before we discuss the harms associated with polygamy, it is important to address difficulties associated with determining those harms. First, at times, it is difficult to distinguish between harms associated with a polygamous community and those associated with a closed, theocratic community. There may be other harms associated with practices in a particular theocratic community unrelated to polygamy. Some of these harms may or may not be the subject of criminal sanction. For example, practices related to child discipline may offend the assault provisions of the Code. Fundamentalist Mormons are expressly told by the elders of their Church that the religious rules governing the various aspects of their lives are more important than the secular laws of the country in which they dwell (BBC 1993: 18). At minimum, this could cause people to believe they are correct when disobeying secular laws, thus potentially weakening the rule of law, which is the cornerstone of democracy.

Second, some of the harms attributed to polygamy may actually be hard to separate from the harms associated with patriarchy, which of course is not limited to the community of Bountiful. For example, monogamous heterosexual relationships are not without harms to women's gender equality.

Finally, in determining the harms associated with polygamy as practised in Bountiful, we were limited by the resources we had in determining them: materials provided by ex-members of the community, a report written in 1993, *Life in Bountiful,* and a paper written by a professor from the University of Alberta.

Some of the impugned harms of polygamy as practised in Bountiful are said to affect society in general and others are said to be very personal. For example, there is concern that the creation of communities such as Bountiful, founded on polygamy, invested with the trappings of legal protection for their lifestyle, could pose a threat to the proper running of a modern democracy. On the other hand, Beaman (2004: 33) asserted: "The need to prosecute LDS [Latter Day Saints] polygamists has disappeared — they are no longer seen as a threat to the nation or to the social order." In response to this argument, Kent (forthcoming) argued that polygamous communities, such as those in Colorado City and Bountiful "very well may be threats to the state to the extent that they put some of its citizens at risk of serious but preventable harm and human rights abuses."

The continued practice of polygamy raises other social concerns. What would result if Canada were to permit a separate set of rules and laws for families and relationships for an insular community like Bountiful? Would other Canadians feel emboldened to assert a right to their own rules and laws for families and relationships without regard to the equality right that our courts have said should otherwise inform law in Canada?[44] A patchwork of sub-communities or sub-groups applying their own rules and laws in the area of family law could arguably undermine our notion of equality under the law and pose a potential challenge to the social cohesion of our country. In effect, we would be saying that equality for all without regard to gender is not an absolute or intrinsically Canadian value.

Invariably, the most vulnerable members of society are women and children. It is well documented that inequality and patriarchal hierarchy are the defining features of most polygamous societies, even those that persist to this day (Thompson and Frez 1994: 29-32 passim). This inequality is demonstrated by the fact that, although the male is usually not restricted in the number of wives he may have (with the exception of Islam which allows a man to have up to four wives with the consent of their other wives), women are only allowed one husband (Wing 2001: 838). This is the case in Bountiful.

In some cases, there is a prevailing culture of female subordination in polygamous households and this is particularly harmful for female children (Wing 2001: 817). For female children, their mother is the most important role model through which they may glimpse their own future. While not without its roots in patriarchy, the legal system and socio-economic structure of Canadian society is informed by the value of formal equality, which feminists and many others believe should stress the freedom of a female to choose her own path in life and associate with anyone she desires. However, this is certainly not the reality of the family environment in the typical polygamous Bountiful household. The idea that a man is the dominant voice in a household and that various female subordinates must vie for his attention is not one that ensures optimum freedom for young females to choose their future direction. These lessons are also negative for the male children in the family, as they learn their notions about women and their unequal status from their family experiences as well.

Polygamy as practised in Bountiful is harmful to children, women and society, because it perpetuates a value system premised on the idea that women have no place in a community as fully equal citizens. Certainly, a value system predicated on the concentration of political and religious authority in the hands of a few men is one that neither respects nor fosters free, critical thought and independent action. In Bountiful, the children of polygamous unions are raised in an environment where women are told what to believe and are controlled entirely by men; they are conditioned to believe that women are subject to the will of their husband. Furthermore, they see that although their mother only has the one husband to whom they owe complete devotion and loyalty, that male can have as many wives as he wishes.

What of the argument that anyone who disagrees or dissents from the rules of a polygamous family group simply has to leave? Such a "right to exit" argument calls to mind an earlier era when a woman's consent to marriage was deemed to imply consent to sexual relations solely on her husband's terms, even if this involved consent to various forms of emotional and physical abuse done in the name of spousal correction. Until 1982, s. 143 of the *Criminal Code* defined rape as non-consensual sexual intercourse between a male and "a female person who is not his wife." Thus, in effect, a wife historically had no right under Canadian law to refuse to consent to her husband's demand for sexual intercourse. Another example of the over-simplicity of the "right to exit" argument may be found in the legally recognized battered woman syndrome, wherein because of the cycle of psychological, physical, financial, sexual and other forms of abuse, women do not leave abusive spouses.[45]

Even so, there are some who might argue that the female participants in polygamous relationships are free to join such relationships and are free to leave these relationships and indeed the very community itself. Within the cultural reality that a polygamous community like Bountiful presents, so the argument goes, women are autonomous. For such "freedom to choose" to have any legitimacy as a value, however, the freedom must be based on an informed choice by women to associate with others in a polygamous arrangement without coercion or peer pressure from others. After all, a truly autonomous person does not uncritically embrace any given religious or philosophical value system. Rather, the rationally autonomous person will from time to time critically examine that religious or philosophical value system and check it against the reality of the outside world. Polygamy, in its effect and practice in Bountiful, may constitute discrimination. Polygamy may also perpetuate patriarchy and reinforce the belief system of the participants in polygamous cultures that a woman's status is determined by her relationship with a man and that her status is less than that of a man's. How can there be an autonomous choice by any female, especially a girl of 13 or 14 years, to engage in a polygamous relationship when such choice arises from her indoctrination into a belief system where she is taught that she only achieves self-worth when she becomes the bride of a man who may be old enough to be her grandfather?

In discussing harms associated with polygamy in the United States in communities similar to Bountiful, Vazquez (2001-2002: 246) argued that even if strict constitutional scrutiny were applied to anti-polygamy laws, they would be shown to serve a compelling government interest. Reasons for prosecuting polygamy include heightened potential for sexual abuse of children in polygamous communities, protection of women from physical and sexual abuse and prosecution of fraud (Vazquez 2001-2002: 230, 233, 239). Effective prosecution of these offences is complicated by the veil of silence imposed by polygamous communities, in addition to their isolation. Criminalizing polygamy may serve to break down the wall that allows these crimes to thrive (Vazquez 2001-2002: 243). Welfare and tax fraud are apparently commonplace in Utah's polygamous communities (Vazquez 2001-2002: 244). Vazquez also listed a panoply of civil laws that are negatively impacted by polygamy, such as worker's compensation, immigration issues, estate matters and the like.[46]

Professor Kent (forthcoming) concluded that polygamy as practised in Bountiful (and in Colorado City) is a "maladaptive practice." Arranged marriages deprive young women of the right to make marital choices. The marriages also control the young women's sexuality, as they become "baby-producers in order to fulfill the religious aspirations of the men who control them." He mentioned that early pregnancies put the young women and babies at additional medical risk, with potentially "deadly consequences from their pregnancies and deliveries."

Professor Kent also noted that in addition to being illegal, underage marriage as practised in Bountiful involves serious human rights violations. In addition to those harms already mentioned, Bountiful is likely involved in a form of trafficking of girls across the international border between Canada and the United States for the purpose of polygamous marriage. This would appear to be "polygamous trafficking" which is a violation of Article 35 of the *Convention on the Rights of the Child* (Kent forthcoming).

Those who argue that polygamy should be decriminalized note that there are many other similar situations in Canadian society that resemble polygamy, such as a man having children with several different women (either at the same time or through serial relationships), yet these relationships are not illegal under Canadian criminal law. However, in Bountiful, polygamy involves the formation of family units typically including several children, with various mothers, in which both women and children are subjected to the real risk of harm. Further, as noted, often the females in Bountiful who enter polygamous marriages are said to be below the age of consent and are not able to understand the consequences of agreeing to a polygamous marriage.

Others opposed to criminalizing polygamy argue that it is preferable to address the underlying existing criminal behaviours, such as underage intercourse, incest or related offences, rather than to prosecute polygamy. These behaviours, they argue, are at the heart of most people's concerns about polygamy. However, while they encompass some of the critical concerns about polygamy, they do not include all of the behaviours which are of concern. For example, the overall psychological harms of polygamy and the associated human rights violations experienced by women and children are not addressed by prosecuting incest and underage intercourse (sexual assault) alone.

Official indifference toward the presence of a polygamous community in Canada does nothing for the individual female residents of that community, who must come of age and mature in an environment that limits not only the career choices available (such as they are) but also relegates them to a life of no choice or severely restricted choice in matters that run the gamut from personal sexual gratification to freedom of expression. Indeed, official indifference toward a polygamous community may, as an unintended consequence, discourage community leaders from putting forward solutions within the group to amend, if not abolish altogether, some of the more egregious affronts to our notion of equality. Non-interference in the affairs of a polygamous community can only ensure that the undemocratic practices of that group will continue and that the hierarchy of that community will continue to monitor and control all aspects of community and private life in an environment that limits freedom of choice, particularly as freedom of choice pertains to the rights of women. There is no neutrality in maintaining a stance of official indifference to the practice of polygamy, however attractive that may be from an administration of justice perspective, because of the small number of people involved in the practice of polygamy. Tacit tolerance of polygamy, or indifference toward its practice, reinforces the controlling hand of the patriarchal elite that runs a polygamous community and ensures a long lifespan for a system that relegates females to second-class citizenship and the role of "baby producers." The danger inherent in according overt acceptance or even tacit acceptance to a minority group's illiberal practices has been eloquently identified by University of Toronto legal scholar Ayelet Shachar (1998b: 95). "In essence, a policy of 'non-intervention' renders *invisible* those violations of members' basic individual rights which occur under the 'shield' of an identity group, because it conceptualizes intra-group affairs as completely 'outside' the domain of state law."

Social and Legal Implications for Women of Non-Prosecution or Non-Legalization of Polygamy

Since we have asserted that limitations on fundamental freedoms are permissible to prevent or stop harm, we need to examine some additional concrete examples of the harm polygamy inflicts on women and children. One way of doing so is to examine the policy and legal implications of polygamy in the areas of relationship breakdown, custody, division of property, social assistance, benefits and taxation. What harm is demonstrated in these areas in a system whereby polygamy is illegal, but not prosecuted?

As noted, Bountiful is the only real life example we have in Canada of a large-scale polygamous community. As such, it can be used as a present day example of the legal issues and social problems that have arisen. Polygamous relationships may also exist on a smaller scale unbeknownst to legal authorities. For instance, a married couple from another country could immigrate to Canada and then take on more "wives," because it is traditional to do so in their home culture. While the social setting in which these relationships exist is more difficult to study, the legal implications of certain issues, such as relationship breakdown would be the same as in Bountiful.[47] As such, Bountiful is used as a running example throughout this section to assess the types of legal problems and the associated social issues that arise in polygamous relationships and communities. Starting from a legal perspective, this section also examines the associated social implications of a large-scale polygamous community on women, children, families and communities.

A legalized polygamy scheme would affect every aspect of law that pertains to families. Not only would the areas mentioned above be in flux, but so would wills,[48] consent to medical treatment, immigration, compensation for fatal accidents, human rights and property, among others. The following analysis demonstrates that legalizing polygamy goes to the heart of our legal system in a way that other changes, such as legalized same-sex marriage, do not. However, if it could be said that allowing polygamy was a part of Canada's commitment to supporting equality, then these laws would have to be altered regardless of the chaos it might cause. This section demonstrates how harm is caused by not prosecuting polygamy, while at the same time ignoring the lack of legal rights accorded to women and children in these unions.

Relationship Issues

Defining Relationships

Case law has defined marriage in the past as between one man and one woman to the exclusion of all others, and more recently as between two persons.[49] Under both definitions, only two people can legally enter into a marriage. In polygynous unions, the first wife is legally married to the male in the relationship, while the other wives have tenuous legal standing. All Canadian laws governing relationships reflect the basic understanding of a limit of only two people entering into a relationship at a given time, whether it is marital or common law.

Hyde v. Hyde,[50] in the context of a potentially polygamous relationship, stated that marriage is defined as "the voluntary union for life of one man and one woman, to the exclusion of all others." Since then, as noted previously, Canadian courts have recognized some foreign polygamous unions.[51] The courts, however, have been careful to decline to recognize polygamous unions for the purposes of immigration.[52] In addition, for the purposes of determining parentage, the law still only recognizes two parents for any particular child.[53]

Relationships that are recognized by law can be marital or common law. Common-law couples increasingly have more and more rights and responsibilities recognized by law. Still, common-law partners are given less legal recognition than marital couples within some provincial and territorial laws.[54] Some provinces have statutes that govern common-law relationships. For instance, in Alberta the *Adult Interdependent Relationships Act* (AIRA)[55] altered over 60 statutes to be inclusive of interdependent relationships. An adult interdependent partner (AIP) is someone who a person has lived with for three continuous years or who is an interdependent partner based on a series of economic and domestic factors, such as financial interdependence, exclusivity or owning property together. One does not have to be in a conjugal relationship to be an AIP; however, one can only have one AIP at a time. Under the AIRA, entering into a marriage with a partner who is not your present AIP, dissolves the original AIP relationship.[56] In addition, a person may not enter into an AIP if she/he is already living with another married spouse. Notably, an AIP cannot be entered into by someone under the age of 16 years unless she/he has prior written consent from her/his guardians.[57]

Therefore, it is not possible under the AIRA to have a marriage and an AIP co-existing at the same time. A polygamous family in Alberta would be treated as a married couple with an extra adult or adults living in the same household. The individuals who are legally married are the only people that would have legal relationship rights and responsibilities pertaining to the other partner.

Divorce and Relationship Breakdown

Under the *Divorce Act*,[58] the sole ground for divorce is breakdown of the marriage. A couple can establish this in one of three ways:

- the couple has lived separate and apart for a period of one year;
- there has been adultery by the other spouse; or
- there has been mental or physical cruelty of the other spouse.[59]

In a polygamous relationship, the issue of adultery would be almost impossible to prove. This is because one of the bars to divorce is condonation.[60] If a woman forgives her spouse for being adulterous, then she cannot file for divorce based on that very same adultery. In a polygamous community, it is accepted that one husband has several wives. Therefore, one of the wives could not file for adultery when she has condoned the very act upon which she is filing for divorce. However, she would be able to file for divorce under the other two grounds. The most common ground used in divorces is that of living one year separate and apart.

Part of the difficulty in obtaining divorce in Bountiful arises because of the way in which the marriage is entered. Only the first wife will have legal marriage rights, while subsequent wives will have no legal relationship status. The "first wife" spot in Bountiful is sometimes given to the first woman a husband takes on, while in other instances it is saved for future use. One such instance occurs when young women are sent across the U.S. border from Utah as Bountiful brides. Bountiful is always in need of more women to assign to husbands and the American brides cannot immigrate unless they get legally married to a Canadian citizen.

Therefore, Bountiful husbands have at times been advised to save the legal marriage spot for an American bride (Palmer 2005).

This type of situation provides an example of how a woman's legal rights could be jeopardized, because polygamy lies outside of the "two spouse" standard. In this situation, the first wife would be common law until a legal marriage took place. Then, when the husband took a second celestial wife from the United States in legal marriage, he would be seen in legal terms as splitting up with the first common-law partner. Yet, in reality the situation would be starkly different, because the law would not recognize the union as involving three people.

Several issues would arise from this situation. First, the common-law wife would technically be able to file for spousal and child support. The limitations legislation in each province would limit the time period in which she could file for spousal support.[61] In reality, however, the common-law wife of Bountiful would continue living in the family unit and would not access her legal rights. If the common-law wife chose to leave the family unit years after her common-law husband had been legally married, technically, the limitation period for the common-law wife to file for support payments would have passed. The law would assume her right to support had been extinguished and no other law would account for the fact that she was in a polygamous relationship during that time period. She may, however, be able to access child support payments, because this is an ongoing right of the child throughout her/his youth.

Many women get married as teenage girls who know nothing beyond life in Bountiful. This makes them extremely vulnerable and unknowledgeable about their legal rights (BC 1993: 11). In reality, leaving a celestial union in Bountiful is seldom done without the permission of the leaders. A wife is sometimes given permission or asked to leave her present husband to be re-assigned within the community. Often, this happens because one husband has fallen out of political favour (Palmer 2005). If a wife were to leave without permission, she would risk losing her entire community. Since Bountiful operates as a completely integrated community, with as little outside influence as possible, this type of move would be extremely difficult. Religion, family relations, childhood education, business affairs and social interaction are all conducted within the confines of the Bountiful group (BC 1993: 6). Therefore, if a woman acts outside of this system, she risks being ostracized from the only community she knows — one which encompasses her entire life and well-being, and that of her children.

The fact that women are so restricted in Bountiful that they are unable to access outside help further increases the limitations placed on them by a polygamous system. Women who want to keep their children with them are given no other option but to subscribe to the system in which Bountiful operates. This further decreases women's equality rights, because their choices are limited if they are to protect their children and the way of life they have come to know. Given the choice between the status quo and breaking outside of a tightly monitored polygamous system, women are given very little room to instigate change or increase equality within the community. For women who risk going outside of Bountiful, the chances of receiving the legal benefits that a monogamous relationship would be entitled to are greatly reduced depending on whether they are a legally married spouse.

Support and Division of Property

To determine spousal support payments, the courts will look at the length of time a couple was together, the functions of each spouse during the relationship and any previous order dealing with spousal or child support. If a wife left her husband in Bountiful, obtaining support would be very complicated. If she were the legally married wife, she would be able to access support. However, the fact that the husband would be supporting not just one other wife, but several wives and many children would affect the standard of living for the family members left behind. If the wife who left the relationship were a common-law wife, she would have no legal status in the relationship, because the husband would be legally married already.[62]

A more pressing issue in Bountiful is whether ex-wives would access the support structure even if it were available to them. In a community that is so insular it avoids outside influence at all cost, women are less likely to ask the courts to intervene on their behalf. In addition, there is the added issue that the leaders control the movement of women between husbands and would likely curtail any legal rights the women have in the interest of limiting outside involvement. This is especially problematic when discussing the rights of children to proper support payments. It is the right of the child to be properly taken care of by her/his parents. Without a system that recognizes these unions or prosecutes them and tries to prevent them from happening, the potential for harm to children is increased as is the inequality of women and children.

For women who actually leave the Bountiful community, there are certain social and legal realities that could prevent full access to division of property. For instance, as noted, the deeds to property in Bountiful have, for the most part, been signed over to the United Effort Plan (UEP). This means that the legal title to much of Bountiful's land is in the name of the group leaders, and that many families are tenants-at-will in their own homes (BC 1993: 7). Therefore, any claim against an ex-husband of Bountiful for the so-called family home would be futile. The ex-wife would be forced to devise a legal claim against the UEP itself, which would be much more difficult and would not take into account family law issues, such as the responsibility of the husband to support a wife who may, in certain circumstances, have limited education or be a stay-at-home mother.

These issues are complicated by the fact that even in families where the husband owns his land, there would still be other wives left in the family home to which an ex-wife is laying claim. With regard to support payments, the husband would already be supporting many wives and children on limited family resources. Even if the wife who was married filed for a legal divorce, the husband could claim the burden of all the other children still living in his household. While the law only recognizes two spouses, it does not limit the number of children who can lay claim to a parent.[63] This argument of limited resources could also be made regarding monogamous families where the husband takes on a new family and has limited resources. However, the extent of the harm is increased in communities, such as Bountiful, because of the large number of women and children who are in any one family.

It should be noted that there are other religious communities in Canada that practise communal property ownership, such as the Hutterites. Although most litigation regarding Hutterite colonies has involved membership issues,[64] a pre-Charter Supreme Court of Canada decision upheld the validity of Alberta legislation that prohibited communal property ownership, even though this was a critical aspect of the Hutterite religious faith.[65] (This legislation was subsequently repealed.) Family law concerns were not behind the anti-communal property legislation. There is little or no reported case law regarding individual men and women leaving Hutterite colonies and arguing for property ownership, whether because of divorce or other reasons. This is because it is clear from the articles of association that govern the communities, that persons who leave Hutterite colonies do not have any property claim.[66] Further, although Hutterites practise communal ownership of property, they do not practise polygamy.

In summary, the law does not account for polygamous families when according rights for spousal support, child support and division of property.[67] The biggest harm in this is that children of these unions are not properly cared for, because their right to support is protected, but intangible. While these children may have a legal right to their father's support, the reality of that right is not likely to be realized. If the child is in a community like Bountiful, where families are discouraged from accessing outside legal remedies or, alternatively, the family lives in such poverty that support payments would be minimal, the child will be forced to live in poverty. Children who have many siblings in a family with several wives will have access to a significantly reduced amount of support. In particular, in a community where there is no income earned by the wives, and the only support for the children stems from a father who has responsibility for many wives, families can suffer financially. While this situation is also seen in monogamous families, it is important to note that the sheer number of wives and children in a polygamous union would exacerbate the same problems experienced by the break-up of a similarly situated two-parent family.

Custody and Access

Courts determine custody and access of children by relying on the "best interest of the child" test. A number of factors are looked at in determining the best interest of the child, such as the amount of time parents can spend with the child, the physical and psychological well-being of the child, and related factors. Courts can choose from a number of types of custodial arrangements, but joint custody (where the parents have some type of shared custodial arrangement) is normally preferred.

In Bountiful, a new baby is showered with attention, but as the baby grows, the time spent with the child diminishes. [68] In a family with one father and up to 40 or even 80 children, there would naturally be a drastically reduced amount of time to spend with each child. In communities like Bountiful, custody and access is complicated by the fact that one woman may have children from many different husbands, if she has been re-assigned from one husband to another a number of times.

Child sexual assault is not in the best interest of any child. Children in Bountiful are reportedly at risk of sexual assault by male members of the group. A 1993 report noted that there had been three recent sex offence trials involving Bountiful males and that the potential for abuse arose, because of the way the community was structured.

> The possibility raised is that within such an insular community, where unquestioned obedience to leaders' directives places rigorous demands upon members, personal problems express themselves in furtive, often abusive, ways. The pressures of dealing with individual problems within an extraordinarily conformist community can be overwhelming; and in Bountiful there are few sanctioned outlets for the resulting frustration (BC 1993: 11).

Since that 1993 report, there have been other allegations of abuse. Because it is a very serious allegation with serious consequences, courts must be very careful when determining whether sexual abuse has occurred. Debbie Palmer (2005), a former Bountiful wife, noted how difficult it is to get children to admit to abuse in the community. Community members teach children to be silent about what is happening. In a complaint involving one of her daughters, Ms. Palmer noted that people in the community tried to silence her daughter before the authorities received evidence of the offence.

In terms of the children, life is complicated, because they have one biological mother and father, and yet they interact with many other pseudo-mothers. When a wife decides to leave Bountiful, it is rare that she is able to take her children with her. The community fights to keep the children within the community (Palmer 2005). For the children who do stay in Bountiful, the chances of access by the estranged mother are greatly reduced. The chances of having joint custody and access would be very difficult given the ideological differences between someone within Bountiful and someone outside of it. While some monogamous families may also have their ideological differences as well, Bountiful has the additional issue of limited access to those who leave the community.

Another complex issue is determining the rights of the other mothers to children who are not biologically theirs, but perhaps with whom the children have bonded particularly well. Also, when the leaders move a wife to a new husband for political reasons, how do the children feel about losing their entire family of siblings and having to start again in a new family?

In families that are polygamous outside of a group like Bountiful, the issues would be that of losing one's siblings. In the break-up of a two-parent family, the children might have to split time with parents, but will still have the continuity of their siblings. In the case of polygamy, the children could end up leaving behind children of two or more other wives. If the ex-wife moves away from the community, the likelihood of ever seeing these children is greatly reduced.

Social Assistance

In each province, regulations indicate how a spouse or partner will be taken into consideration when calculating the amount a household is entitled to for social assistance. In Alberta, anyone who is either a spouse, an AIP,[69] or who has a child with the welfare recipient, will have their income included in the household for the purposes of determining eligibility for social assistance.[70] British Columbia has similar legislation[71]; however, Narinder Serown (2005) from the Interior Service Centre near Bountiful has noted that his office has not had to deal with the issue of polygamy and eligibility. This information confirms that the main problem with social assistance legislation ignoring the existence of polygamous unions is that the legislation has not addressed this issue and therefore does not take into consideration how polygamous families should be covered.

For instance, if a Canadian from a cultural background that permits polygamy had two wives, the social assistance system would likely miss the polygamous nature of his family. The legally married couple in that situation would be treated as a couple for the purposes of determining the household income, while the second wife who did not in fact have legal married status would be treated as a single person who just happened to be living with a married couple. The income of the "second wife" would not be included in the household income of the legally married couple. If she did not have an income she would apply for welfare as an independent. So while all parties would be covered by welfare, the true nature of the family would not have been taken into consideration in these calculations.

The purpose of the spouse-in-the-house sections of this type of legislation is to determine household income for interdependent partners, co-parents and spouses. In doing this, the welfare system accounts for families supporting one another within a particular household. The failure of social assistance to recognize that there is a three-person household would allow that household to collect an increased income as compared to other households. However, even if a polygamous family were legally recognized, legislation such as Alberta's *Income and Employment Supports Act* only contemplates households with the possibility of two partners. Therefore, there is no legal scheme on which to decide what a polygamous family unit would be entitled to from social assistance.

Social assistance is a means of levelling inequities between the wealthy and the impoverished. Women, especially, are in need of this type of equalization, because of poverty issues and inequalities between men and women. The welfare system does not contemplate polygamous unions and, as such, the situation of women within these unions has not been examined. It is unknown what inequities would result if polygamous families accessed social assistance either through fraudulent means or if the system were opened to these families. Research has already indicated that the spouse in the house legislation has a negative effect on women.[72] The problem with ignoring the existence of polygamous families is that this negative effect could be compounded. At the very least, continuing on in the present situation, without legal recognition or alternatively prohibition of polygamous unions, puts women who need support at a disadvantage.

The following exploratory questions are not contemplated by welfare legislation and would need to be answered to understand the repercussions: Are there monetary inequities among wives in a polygamous relationship? What system should be used to determine a fair household income in a polygamous situation? How is welfare fraud prevented when only the first wife has legal marriage rights?

Most important, it would be essential to examine whether polygamous families are indeed self-sustainable given the social circumstances of these communities. The social welfare system is set up as a necessary safety net for those individuals and families living in poverty. In Bountiful, many of the women are expected to care for the family home and for children, while, for the most part, men work outside the home.[73] With men having 2 to 12 wives, and up to 80 children, it would appear to be virtually impossible for any family to make ends meet monetarily. At present, women and children who are in need of this welfare system may be able to access it through deceptive means, but even then the amount of money they would receive would be based on an incorrect version of the reality of their lived experience.

On the flip side, if the social welfare system were to take into account the reality of a polygamous lifestyle, and it was confirmed that these families for the most part were not self-sustainable, this would cause a drain on government funds. While all families deserve to have access to a social safety net, the decision to support polygamous families would take special consideration.

Benefits

Benefits provide a family with health, dental and disability funding. The cost to the family is usually minimal and is often subsidized by the employer. There are maximums within benefit plans that allow each family member to access up to a certain dollar figure of health services. Usually, there is the option of a single benefit plan or a family one, the latter covering two spouses and children. Polygamous unions are not contemplated within benefit schemes. An employer offers a benefit plan as a perk of being an employee and also as a means to keep employees healthy. Often, the requirements of having family access the scheme are not very stringent. The employer usually has some idea that the employee is common law or married and that there are children from that relationship. The insurance carrier for the benefit plan does not always require proof of the familial relationships.

While a second or third wife would not be able to apply for benefits, the children of those wives could easily be grouped with the first wife and receive access to benefits. This creates two problems. First, it creates an inequity between first and subsequent wives. The first wife has access to health, dental and disability benefits through her husband while the other wives do not. Second, it puts a strain on insurance carriers who could be covering more children than those who are part of the first marriage or partnership. All of these children deserve coverage, as do each of the wives. However, insurance carriers would likely decide to increase premiums if there were a substantial number of polygamous families in an area.

Polygamous families that are not part of a community but perhaps have come from another country and managed to keep their union to more than one wife a secret, have equally difficult issues. The fact that only one wife has access to health benefits could create an imbalance of power among women in the family unit. This situation could add to the disempowerment of women in the family unit, while at the same time creating a competition among women for limited resources. So, while benefit plans are meant to help families lead healthy lives, the present system is not designed to meet the needs of polygamous families. Yet, this is not necessarily a reason to change laws to include polygamous families, but instead a reflection of how non-prosecuted polygamy laws can contribute to a system of inequity. The issue of a lack of benefits can only be addressed in a system where polygamy is legal and laws are changed to be inclusive, or where polygamy is prosecuted and the negative social results of polygamy are addressed.

Taxation

Similar to other laws affecting relationships, our taxation system uses the language of "spouse" or "common-law partner" implying that it is assumed there are only two people in the relationship.[74] While the two individuals who are legally married in a polygamous family would have full rights and responsibilities under our taxation system, the other wives would be excluded. If a husband were to claim all of his children from each of his wives, he would be in a situation where his deductions outweighed or greatly reduced any taxes owed. Second, third and fourth common-law wives in a polygamous union would not have their relationship status recognized within the taxation system. This would be problematic if, for instance, the husband died and only the legally married wife received the tax benefits of his death. The taxation system is complex and has not taken into consideration polygamous families. This fact leaves the tax system open to imposing many inequities on common-law wives in polygamous unions and adding to the harm caused to women involved in these unions.

Summary

The above examination demonstrates that because our law is based on a conception of only two spouses in a relationship, legalizing polygamy would cause much chaos and confusion. However, if there were a recognized equality issue at stake, the creation of chaos would not be a valid defence against upholding equality (e.g., by enacting legislation to include polygamous relationships). This exploration of how the law is structured around two spouses, and the resulting major difficulties in regulating polygamous unions, demonstrates the risk to which we expose women and children. Without lawmakers either regulating polygamy and altering all of the above legislation to take into account the issues resulting from polygamy, or legal authorities prosecuting polygamy and working on a means to combat it in the future, these families are at risk. Women's rights are not being recognized, and women who leave these polygamous unions are left in dire poverty. At the same time, children's rights are diminished, because of the poverty and reluctance to ask for outside help. Alternatively, women who stay in communities, such as Bountiful, have little opportunity to lobby for change that would support their equality rights and those of their children.

Women and Girls' Equality Rights and the Non-Prosecution of Polygamy

Minority Group Rights and Equality

As we have seen, one cannot discuss the non-prosecution of polygamy in Canada without inviting an examination of the extent to which there is constitutional protection for religious and minority group rights. Religious or cultural minority groups are often most concerned about carving out a special status for their own practices and customs in the area of "personal law" (i.e., that area of law that concerns laws regarding marriage, divorce, child custody and support, division of matrimonial property and inheritance) (Okin 1998: 679). Accommodating the cultural practices of groups when those practices differ in whole or in part from the practices of mainstream society may seem the fair thing for a modern, pluralistic, democratic nation to do, all in the name of tolerance and respect for cultural diversity. In fact, respect for minorities has been recognized by the Supreme Court of Canada as a constitutional principle.[75]

However, as noted, the accommodation of all practices of a minority cultural or religious group may, in some cases, create a situation where the vulnerable members of that group are subjected to harm. Polygamy (at least as practised in Bountiful) may well be one of those situations. In particular, as already noted, polygamy may affect the equality rights of women and girls.

Thus, an unfiltered acceptance of minority group rights would only ensure that any inequality integral to a polygamous community, such as Bountiful, would continue to thrive. This would create a serious problem for vulnerable individual members of such a community whose status may be deigned secondary by the group's leaders, all in the name of traditional religious or cultural practices. The reality of culture-based gender discrimination is such that the most insidious forms of it are practised in that private sphere of life where historically the highest bar was raised against remedial state action. Therefore, if one of the fundamental premises of a legal system in a modern democracy is that the personal liberties and rights of individuals matter, then our courts need to tread carefully when they adjudicate a matter that involves an assertion of protection for a religious rite on behalf of a group. One legal writer (Kymlicka 1998: 162-163) succinctly put the issue in the following terms: "If we wish to defend individual freedom of conscience, and not just group tolerance, we must reject the communitarian idea that people's ends are fixed and beyond rational revision. We must endorse the traditional belief in autonomy."

Even so, there may be a tendency on the part of otherwise well-intentioned persons to regard polygamy as an aberration which, since it is practised by only an extremely small number of people in Canada, should be accorded a "leave well enough alone" respect. After all, so the argument goes, if no laws are being broken and the children of polygamous unions are being looked after, who are we to judge how individuals or even an entire community like Bountiful should lead their lives? There may even be some advocates of a "group rights" model of multiculturalism who would advocate a policy of tolerance toward, if not formal legal recognition of, the religious and cultural practices of a polygamous community. They might argue that so long as a polygamous community respects Canadian laws as they pertain to the community's relationship with those it considers "outsiders," the wider community should respect the religious and cultural practices of that community. However, this argument is problematic. If polygamy were to be accorded official sanction by government policy, a democratic country would be permitting the existence in Bountiful of a community where rights normally accruing to citizens are simply not present or, if they are present, they are diminished to the point of irrelevance. To put the issue in words reminiscent of a passage from *Animal Farm*,[76] the state would be saying that although all Canadians may be equal before and under the law according to the Charter, some Canadians are less equal than others and there is nothing that can or should be done about it.

Therefore, a democratic conception of minority rights should carry an inherent acknowledgment of the difficulty, if not the impossibility, of accommodating all the practices of a given minority religious or cultural group. Some religious or cultural groups are loathe to have their particular sets of cultural traditions informed by secular democratic values like equality and individual autonomy, and the FLDS community of Bountiful is certainly one of them. This begs a vexing question. Why should a modern democracy which professes gender equality as a fundamental constitutional right pursuant to s. 28 of the Charter, give legal sanction to the cultural and religious practices of a community when such practices relegate females to second-class citizenship?

Failure to Prosecute Polygamy Violates Charter subs. 15(1)

If one accepts that women (and children) are adversely affected by polygamy, either the government's failure to continue to legislate against polygamy or its failure to enforce existing *Criminal Code* provisions on polygamy discriminates against women (and children) under Charter subs. 15(1).

Failure to Continue to Legislate

There are legal decisions that deal with the government's failure to act and the Charter. Cases involving the government's positive duty to act usually involve Charter subs. 15(1). For example, in *Vriend v. Alberta,*[77] the Supreme Court of Canada held that Alberta's *Individual's Rights Protection Act* violated Charter subs. 15(1), because it did not include "sexual orientation" as a ground for protection under this human rights legislation. In *Eldridge v. British Columbia (Attorney General),*[78] the government's failure to provide sign language interpretation for hearing impaired patients was held to violate their Charter subs. 15(1) rights.

In *Dunmore v. Ontario (Attorney General),*[79] the Supreme Court of Canada dealt with the issue of whether excluding agricultural workers from the labour relations scheme infringed their rights under Charter s. 2(d) (freedom of association). The Supreme Court (per Bastarache J. et al.) noted that ordinarily the Charter does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms.[80] The Supreme Court stressed that it is more usual for cases dealing with under-inclusion to be examined under Charter subs. 15(1).[81] However, where history has shown that the posture of government restraint will expose people to harm (e.g., unfair labour practices), the Charter may impose a positive obligation on the state to extend protective legislation to unprotected groups.[82] Thus, excluding individuals from a protective regime may contribute substantially to the violation of protected freedoms. The Supreme Court grounded the claim in fundamental Charter freedoms rather than in access to a particular statutory regime.[83] The Court also noted that the doctrine expressed in the case does not, on its own, oblige the government to act where it has not already legislated in a particular area.[84] To be clear, if the state chooses to legislate in a particular area, it must do so in a way that is consistent with the Charter subs. 15(1), and this would mean that unprotected groups should be included.

Porter (1998: 78-79) noted that in both *Vriend* and *Eldridge*, at issue was the under-inclusiveness of existing government legislation or practice rather than the lack of legislation. This was also the case in *Dunmore*. However, Porter also noted that the Supreme Court of Canada's finding in *Vriend* was justified by the disproportionate impact of the exclusion of sexual orientation as a substantive equality issue. Thus, if the lack of a government action has a disproportionate impact on a disadvantaged group, Charter subs. 15(1) could be breached. Further, Justice Cory held in *Vriend* that "Dianne Pothier has correctly observed that [Charter] s. 32 is 'worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority.'"[85] Porter (1998: 79) also argued that the majority decision in *Vriend* makes it clear that subs. 15(1) obligates the government to protect and promote equality in all areas under its jurisdiction. He went on to state (1998: 79) that legislative inaction is not neutral; one must analyze the effects of inaction to determine if it is inconsistent with Charter subs. 15(1).

Macklem (1999: ¶3) argued that the decision in *Vriend*, coupled with the decision in *R. v. Morgentaler*,[86] illustrate that the Charter can be used to protect minorities from the consequences of the "absence of will on the part of the majority." However, he also expressed some reservations about the conclusion that the Charter imposes positive duties on the government. Rather, he would prefer to find that some omissions on the part of the government are actually actions, which can be the subject of a Charter challenge (1999: ¶¶26-39).

Polygamy is the subject of a prohibition under the *Criminal Code*. If the government were to repeal Code s. 293, would this violate Charter subs. 15(1)? There are no cases that indicate whether repealing a law would result in a violation of the Charter. If the Supreme Court of Canada were to determine that the Code is under-inclusive, because the polygamy law has been repealed, one could speculate that they could possibly find this situation to have a disproportionate impact on women and children, and therefore Charter subs. 15(1) would be breached. As noted above, Charter subs. 15(1) obligates the government to protect and promote equality in all areas under its jurisdiction: criminal law is clearly under Parliament's jurisdiction. The lack of Code protection for women (and children) through anti-polygamy legislation could offend their rights under Charter subs. 15(1). Because of the lack of legal precedent, this conclusion is purely speculative at this point. In addition, this is a very difficult argument to make because courts have been very clear that the government's positive duty to act only applies where the government has already "acted."[87] It may not be enough to say that the government has acted simply by enacting the anti-polygamy prohibition. Also as noted above, it is well within the government's purview to choose other methods to deal with undesirable behaviours, such as regulation instead of criminalization.

Whether the lack of anti-polygamy legislation could be saved under Charter s. 1 is discussed below.

Failure to Enforce

A second possible violation of Charter subs. 15(1) is the failure by the government to enforce the anti-polygamy provision of the Code. Using the *Law* test, one could argue that the failure to enforce this legislation has serious equality implications. The argument would be that the government, having enacted anti-polygamy legislation, has a positive duty to act to enforce it.

By not prosecuting Code s. 293, the state is, in effect, saying to the residents of Bountiful that Canada will, irrespective of the consequences, tolerate polygamy. By not prosecuting s. 293, the legal system would be saying in effect that, insofar as polygamous groups go, the old philosophical and legal distinction between private and public spheres of activity should be finely if narrowly applied. The inherent dilemma in such an approach is that gender-based discrimination is often most acutely experienced in the so-called private sphere. Indeed, in many traditional cultures, the strict control of women is enforced in the private sphere through actual or symbolic fathers, either acting alone or through the complicity of their first wives (Okin 1998: 679).

Not prosecuting polygamy in Canada could be interpreted by some as de facto recognition of the special status a unique community has to maintain effectively a separate social structure with a set of values that prepares women for a lifetime of subservience within the confines of that community, with fewer rights than women living within the wider Canadian community. Moreover, de facto recognition of polygamy as practised in Bountiful perpetuates domestic roles for women and removes any incentive for females to attend school beyond the junior high level, which further restricts the lifestyle choices that might otherwise be available.

Some people involved in the practice of polygamy might argue that it is too late to begin to prosecute under s. 293 of the Code after many years of indifference to the practice. However, one can point to the well-known indifference of society and authorities to spousal abuse over many decades, even though criminal laws dealing with assault existed. With the assistance of the women's movement, the state became aware of the gender equality implications of ignoring abuse (which largely occurs in the private sphere) and is now prosecuting spousal abuse cases.[88]

Charter of Rights s. 1

Once the court has decided that legislation offends a particular section of the Charter, the government has the opportunity to defend its actions by providing evidence that its laws or actions are demonstrably justified in a free and democratic society under Charter s. 1. In the case of anti-polygamy laws, the government would be defending its actions in removing the prohibition against polygamy from the *Criminal Code*, or in not enforcing this provision. In the *Dunmore* decision, the Supreme Court of Canada analyzed whether repealing certain protections for agricultural workers under the Ontario *Agricultural Labour Relations Act* could be saved by Charter s. 1. The Supreme Court of Canada relied on the guidelines set down in *R. v. Oakes*[89] to determine whether the limitation of a right in this manner may be saved by Charter s. 1. The court noted that the government must establish that the objective underlying the limitation is of sufficient importance to warrant overriding a constitutionally protected right or freedom and that the means chosen to reach this objective are proportionate.[90] In making this analysis, the court must pay close attention to the factual and social context surrounding the enactment of the legislation."[91] These factors assist the court in characterizing the objective of the law that is under scrutiny.

Polygamy is dealt with under the *Criminal Code*, which was enacted to protect Canadians from harm (see discussion above). Thus, the government would have to justify not protecting Canadians from the harms associated with polygamy, either through repealing anti-polygamy law or through not enforcing it. One major justification the government would likely rely on in either case is that anti-polygamy laws infringe the right to freedom of religion under Charter s. 2(a). If the government seeks to rely on this justification, the court would be faced with balancing the right to gender equality with the right to freedom of religion. This balancing is discussed in Part II.

PART II: ANTI-POLYGAMY LAWS AND RELIGIOUS FREEDOM

Freedom of Religion and Anti-Polygamy Laws

Historically, in Canada, the *Constitution Act, 1867*[92] provided protection for denominational schools in s. 93. However, freedom of religion was not listed under the heads of power in Canada's *Constitution Act, 1867*. Canadian courts did recognize freedom of religion as having constitutional status.[93] However, because religion was not a head of power listed in the *Constitution Act, 1867*, most of the historical case law focussed on assigning religion to a particular head of power, rather than determining the meaning of "freedom of religion" (Beaudoin and Ratushny 1989: 173).

Charter s. 2(a)

Unlike in the *Constitution Act, 1867*, religion is clearly featured in the Charter. The preamble to the Charter says that "Canada is founded upon principles that recognize the supremacy of God and the rule of law." In addition, Charter s. 2(a) guarantees freedom of religion and conscience. Nevertheless, because they are complex terms, there is no comprehensive definition of "religion" or "conscience" in Canadian legislation. Canadian case law does provide some guidance as to the breadth of these terms.

Legal decisions under Charter s. 2(a) fall under three general categories: Conflicts with legislation or by-laws (e.g., Sunday closing laws), parental rights (e.g., in medical decisions) and educational issues (e.g., funding and religious instruction).[94] The leading Supreme Court of Canada decision on freedom of religion deals with a challenge to Sunday closing legislation. In *R. v. Big M Drug Mart*,[95] the Supreme Court of Canada (Dickson J.) held that the *Lord's Day Act* violated Charter s. 2(a) and was not saved by Charter s. 1. In describing freedom of religion, Justice Dickson said:

> ¶ 94 A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> ¶ 95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from

> compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Subsequent legal decisions have described the above passage as the essence of freedom of religion in Canada.[96] In the passage, there are three aspects to the guarantee of freedom of religion noted by Justice Dickson:

- the right to entertain religious beliefs as one chooses;
- the right to declare religious beliefs openly without fear of any hindrance or punishment; and
- the right to show that belief by worship and practice or by teaching and dissemination.

Thus, religion and conscience encompass more than the beliefs of organized religions of the world, but also include purely private beliefs and practices (Beaudoin and Ratushny 1989: 173). In addition, *Big M Drug Mart* makes it clear that in Canada we are granted freedom of religion and freedom *from* religion (Beaudoin and Ratushny 1989: 174).

Freedom, in Justice Dickson's judgment, is the absence of coercion or constraint. Justice Dickson also notes that there may be limitations on a freedom as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Thus, the freedom of religion provided in the Charter is not absolute and will involve a balancing with other competing claims of members of society.[97]

A second seminal case on Sunday closing is *R. v. Edwards Books and Arts Ltd.*[98] In that case, the Supreme Court of Canada held that Ontario's Sunday closing legislation infringed the freedom of religion of some of the retailers, but was justified under Charter s. 1 as a reasonable and proportional legislative attempt to protect retail workers by ensuring that there is a common pause day.

In *Edwards Books*, Justice Dickson said that "the purpose of *Charter* s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature and, in some cases, a higher or different order of being."[99] Justice Dickson went on to say: "The *Charter* shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened."[100]

In one recent pronouncement on freedom of religion, *Syndicat Northcrest v. Amselem,*[101] the Supreme Court of Canada dealt with whether condominium by-laws preventing Orthodox Jewish condominium owners from setting up succahs (religious huts) on their balconies violated their freedom of religion under the *Quebec Charter of Human Rights and*

Freedoms.[102] The Supreme Court of Canada (per McLachlin J. et al.) discussed freedom of religion under the Quebec Charter and under the Canadian Charter.

The Supreme Court noted:

> [R]eligion typically involves a particular and comprehensive system of faith and worship.... In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definitions and spiritual fulfillment, the practices of which allows individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[103]

The Court noted that it had long articulated an expansive definition of freedom of religion "which revolves around personal choice and individual autonomy and freedom."[104] The Court also stressed that it is not qualified to rule on the validity or veracity of a particular religious practice or belief. However, it is qualified to inquire into the sincerity of the belief, if that is an issue.[105] In *Ross*, Justice LaForest indicated that it is not appropriate for courts to examine a particular religious belief, but will simply protect all beliefs that are sincerely held. The court stated that it was not open to the Court to question a belief's validity.[106] In sum, a person alleging a claim involving her or his freedom of religion must show the court that she or he has a practice or belief with a nexus with religion which calls for a particular conduct, engendering a personal connection with the subject or object of the individual's spiritual belief, and that she or he is sincere in that belief.[107]

Beaudoin and Ratushny (1989: 174) argued that an expansive approach to Charter s. 2(a) is also supported by the inclusion of "conscience" in s. 2(a). This was exemplified in the case *R. v. W.H. Smith Ltd. et al.*[108] wherein the court stated that the inclusion of conscience in Charter s. 2(a) was intended to include beliefs that are fundamental to their adherents but which do not include the "concept of a theistic centre among the cardinal principles of belief."[109]

Horwitz (1996: 2-3) argued that freedom of religion is not well defined in Canadian case law. He suggested the following minimal criteria for a claim to fall under Charter s. 2(a):

> (i) a belief that is spiritual, supernatural or transcendent in nature, whether or not it is shared by anyone else, so long as it is sincerely held;
> (ii) the belief is best served or honoured by certain behaviour, whether individually or in a group;
> (iii) if the behaviour is not actually compelled by the belief, it should be part of the regular practice of a group of common faith-holders.

Freedom of religion in Canada appears to encompass both the positive right to hold religious beliefs and to manifest those beliefs, and the negative right to freedom *from* religion. In the case of free exercise of religion, the Supreme Court of Canada envisages the wide application of Charter s. 2(a) to interference that is "direct or indirect, intentional or unintentional, foreseeable or unforeseeable."[110] At the same time, "trivial or insubstantial" burdens on religious freedom are outside the ambit of s. 2(a).[111]

As noted above, a number of criminal laws in Canada apply generally, but may limit one's freedoms in a tangential or trivial way. For example, some religions hold that wives must obey their husbands. However, the Code provides that a wife can refuse to consent to sexual intercourse, and if the husband does not respect the refusal, he can be charged with and convicted of sexual assault. This provision may appear to violate the husband's freedom of religion, but the harm that is protected outweighs these concerns. Thus, a person's religious beliefs may have to be limited by the reality that it is illegal to force a person to have sex, even if she is your spouse. In the same way, it may be argued that the harm prevented by anti-polygamy laws outweighs any entrenchment on the freedom of religion of those who sincerely believe polygamy is a religious tenet.

It is unlikely, however, that anti-polygamy laws will be found to be trivial or insubstantial burdens on the current religious communities that practise polygamy. Based on their practices, it appears that polygamy is a fundamental part of the religion they practise and that anti-polygamy laws would pose more than an insubstantial or tangential burden on the community. Thus, at first analysis, it would appear that anti-polygamy laws offend Charter s. 2(a).

Freedom of Conscience and Religion in International Law

With regard to freedom of religion, the *International Covenant on Civil and Political Rights* (acceded to by Canada in 1976) (ICCPR),[112] contains provisions that are quite similar to those contained in the Charter. Article 18 reads:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Beaudoin and Ratushny (1989: 190) noted that the provision in Article 18(3) mirrors Charter s. 1 and is congruent with the holding of the Supreme Court of Canada in *Big M Drug Mart* that freedom under the Charter is "subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[113] The ICCPR was referred to by the Ontario Court of Appeal in *R. v. Videoflicks*,[114] the lower court decision of *Edwards Book*. The court noted that Article 18 mandated a multi-faceted right to observe and express religious beliefs "beyond the ability to hold certain beliefs without coercion and restraint."[115]

Thus, based on our domestic jurisprudence supported by international law, if people in a group, such as Bountiful, assert that polygamy is a basic religious tenet sincerely held, the case law indicates that Canadian courts would accept that assertion and would initially find that the freedom of religion of the group was engaged. However, as noted, the analysis is not yet complete.

Freedom of Religion in the United States

American case law may shed some light on the interpretation of freedom of religion and polygamy, bearing in mind the significant differences between the constitutional framework for freedom of religion in the United States and freedom of religion under the Canadian Charter.

The First Amendment to the United States Constitution[116] guarantees the free exercise of religion and ensures that the federal government complies with the non-establishment principle. This principle says that the government will not sponsor, support or actively involve itself with a particular religion or a religion in general. (Canada does not have a non-establishment clause per se.) The case law on the free exercise of religion is most relevant to Canadian jurisprudence. In the United States, there is absolute freedom of religious belief or non-belief. Additionally, expression of religion or practice is generally only subject to limits that are clearly necessary for society's protection.

Free exercise of religion in the United States is protected if the belief is sincerely held and is a religious belief of any kind.[117] The belief does not need to be part of an organized religion and includes beliefs held by non-traditional religions, such as indigenous religions, secular humanism, atheism and polytheism.[118] An open-ended approach to freedom of religion was adopted in the California court in *Re Hinckley's Estate*.[119] In this case the court said: "The word 'religion', in its primary sense…imports, as applied to moral questions, only recognition of a conscious duty to obey restraining principles of conduct. In such sense, we suppose there is no one who will admit that he is without religion."

As noted previously, in general, the United States jurisprudence differentiates between religious belief and religious practice. The freedom of religious belief is absolute, but the immunity afforded religious practices by the First Amendment is not absolute.

The United States courts have followed one of two tests to determine if a law infringes the free exercise of religion. The first is the "strict scrutiny test." The state may abridge religious practices only if it is demonstrated that some compelling state interest outweighs the individual's interest in freedom of religion. In these cases, the court follows a two-step analysis. First, it determines whether the statute poses a burden on the applicant's freedom of religion, and then second, whether a compelling state interest justifies the infringement. The second line of U.S. cases follows the less stringent "facially neutral and generally applicable statutes that do not have as their primary purpose burdening of religious practice" test. For a summary of these decisions, please see Appendix A.

Discussion

The United States jurisprudence on polygamy has been criticized for relying on public morality rhetoric rather than providing a detailed analysis into the government's legitimate interest in its criminalization (Vazquez 2001-2002: 244). Some have also noted that the original anti-polygamy laws were passed in response to anti-Mormon sentiments in the United States and were not really based on any legitimate state interest.[120] (It should be noted that Canada does not have a similar history of laws directed at Mormon polygamy.) Some have argued that there are few factual proofs that polygamy is dangerous, that it does not degrade women, that women are free to leave polygamous relationships, and that it may have advantages over monogamous relationships (Donovan 2002: 566-586). Proponents of finding anti-polygamy laws to be unconstitutional also point to the difficulty of prosecuting polygamy, because it is similar to simple cohabitation. Further, if police were to enforce polygamy laws, families would be broken up as parents go to prison (Gillett 1999-2000: 520). Finally, it should be noted that the American Civil Liberties Union has stated that it "believes that the criminal and civil laws penalizing the practice of plural marriage violate constitutional protections of freedom of expression and association, freedom of religion, and privacy for personal relationships among consenting adults" (ACLU nd).

Although opponents of anti-polygamy laws argue that selective prosecution of the individual crimes is preferable as it infringes less on the free exercise of religion, Vazquez (2001-2002: 246-247) argued that it may be impossible to target crimes committed under the "cloak of religion" without targeting that religion in any event, which could be unconstitutional.

Applicability of U.S. Jurisprudence to Freedom of Religion in Canada

As we have seen, the U.S. cases applied the "compelling state interest" or "strict scrutiny test" to freedom of religion and later developed the "facially neutral" test. It must be remembered that there is no equivalent to Charter s. 1 in the American Constitution. Any limits to a right are determined through internal application of doctrines like the compelling state interest or facially neutral test to the right itself. On the other hand, in Canada, the Charter provides for explicit overrides to guaranteed rights and freedoms in ss. 1 and 33. While Charter s. 1 may bear some resemblance to the compelling state interest doctrine, it is not clear to what extent United States jurisprudence will apply, especially in view of the more recent development of the facially neutral test.

Beaudoin and Ratushny indicated that Charter s. 1 and the jurisprudence that has arisen to expound on the nature of the limits implied in that section clearly bear a resemblance to the compelling state interest test as set out in *Sherber*.[121] The authors note that Dickson J. in *Big M Drug Mart* says:

> What unites freedoms in the American First Amendment, s. 2(a) of the *Charter* and in the provisions of the other human rights documents in which

> they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or constrain its manifestation.... It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental".[122]

However, as noted previously, the Charter does not have a clearly set out establishment clause as part of s. 2(a). Thus, U.S. jurisprudence on polygamy and freedom of religion may be somewhat helpful, but should be applied with caution to Canadian freedom of religion issues.

Limits on Freedom of Religion in Canada

While the justices of the Supreme Court of Canada seem to disagree on whether the limits to freedom of religion should be applied during the Charter s. 2(a) analysis or during the Charter s. 1 stage, they do recognize that there are limits to the right. These limits appear to fall into one of three categories: conflicts with other rights, harm (individual and public safety), and significant societal interests. While there are no legal decisions indicating how the court might view polygamy law as a limit on freedom of religion, other cases provide guidance as to how such an issue would be decided.

In *Amselem*, the Supreme Court of Canada noted that often individual rights will compete with each other. In fact, although a broad and expansive interpretation of freedom of religion should be taken initially, the court noted that "our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom."[123] The court went on to say:

> Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of competing rights of individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.[124]

In *Amselem*, the majority of the Supreme Court held that the intrusions or effect on the respondent's right to personal security and right to enjoy property (by allowing the appellants to exercise their freedom of religion) were minimal and could not be considered as imposing valid limits on the exercise of freedom of religion.[125]

In the case of polygamy, it cannot be said that the intrusions on gender equality rights are minimal. Consequently, the court would have to balance the right to freedom of religion with gender equality rights under a full s. 1 analysis.

Further guidance may be obtained from *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*.[126] In this case, a group of Jehovah Witnesses was denied a change in a zoning by-law so they could build a church. The majority of the Supreme Court of Canada dealt with the issue on the basis of administrative law principles. However, the dissenting justices (per Bastarache J.) discussed freedom of religion at length. Stressing that the state is an essentially neutral intermediary between various denominations and between denominations and civil society,[127] Bastarache J. went on to emphasize that the right to freedom of religion is not absolute. "This freedom is limited by the rights and freedoms of others. The diversity of opinions and convictions requires mutual tolerance and respect for others. Freedom of religion is subject to limits necessary 'to protect public safety, order, health or morals'" [citations omitted].[128]

Cases involving the role of freedom of religion in family issues shed some light on how the Supreme Court of Canada might view harm in the context of freedom of religion. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[129] the Children's Aid Society applied to take a child into care because, for religious reasons, the parents refused to allow the child to undergo a blood transfusion. Five of the nine Supreme Court of Canada justices who heard the case agreed that the child protection order violated the parents' freedom of religion, concluding that Charter s. 2(a) protected religious beliefs — even if those beliefs could harm another. Nevertheless, the impugned legislation was saved by Charter s. 1. Speaking for the majority, Justice La Forest said:

> ¶107 However, as the Court of Appeal noted, freedom of religion is not absolute. While it is difficult to conceive of any limitations on religious beliefs, the same cannot be said of religious practices, notably when they impact on the fundamental rights and freedoms of others. The United States Supreme Court has come to a similar conclusion; see Cantwell v. Connecticut, 310 U.S. 296 (1940). In R. v. Big M Drug Mart Ltd., supra, this Court observed that freedom of religion could be subjected to "such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (p. 337). Similarly, in P. (D.) v. S. (C.), supra, L'Heureux-Dubé J. wrote, in obiter, at p. 182:
>
>> I am of the view, finally, that there would be no infringement of the freedom of religion provided for in s. 2(a) were the *Charter* to apply to such orders when they are made in the child's best interests. As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion.

Although the majority noted that freedom of religion could be limited, in this particular case, the court held that it should not formulate internal limits to the scope of freedom of religion; rather it should leave the balance of competing rights (state interests vs. individual rights) to a Charter s. 1 analysis.[130] This is because Charter s. 1 was a more flexible tool with which to balance state restrictions on rights versus individual rights.

Four justices argued that the right to freedom of religion should not include conduct endangering the life or seriously endangering the health of children. Speaking for the minority, Justice Iacobucci said:

> ¶224 However, the freedom of religion is not absolute. Although La Forest J. considered that limitations on this right are best considered under a s. 1 analysis, we are of the view that the right itself must have a definition, and even if a broad and flexible definition is appropriate, there must be an outer boundary. Conduct which lies outside that boundary is not protected by the *Charter*. That boundary is reached in the circumstances of this case.

The minority held that Charter s. 2(a) might be limited when it is called on to protect activity that "threatens the physical or psychological well-being of others."[131] The minority also noted that "although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, and it is the latter freedom at issue in this case."[132]

In sum, five of the justices would seek to provide wide protection to freedom of religion and to require any restrictions be justified under Charter s. 1. Four of the justices would argue that there are some limitations to the right to freedom of religion, which can be applied to limit the scope of the right itself.

Dr. Epp Buckingham (2001: 477) noted that the Supreme Court of Canada has defined religious freedom in *Big M Drug Mart*, but has not clearly defined its appropriate limits. Horwitz (1996: 2-3) also noted that the conflict between religion and the state has not usually focussed on whether the state and its laws may interfere with religious obligations, thereby forcing someone to obey a law that is in conflict with her/his religious beliefs. Horwitz (1996: 3) suggested that the influx of immigrants with diverse religious beliefs may well necessitate recognition that there will be more conflicts between the practices of religious minorities and laws written by the majority. He compared the situation in Canada with that of the United States, wherein recent legal decisions emphasize that legislation and the goals of the state usually take precedence over freedom of religion.[133]

Conflicting Rights under the Charter (Freedom of Religion vs. Gender Equality)

Rights provided under the Charter, such as the right to liberty and the right to equality,[134] may compete. Then, the issue becomes, should one right supercede the other, should the rights be reconciled or should some other process be followed?

The international community has dealt with the issue of the hierarchy of rights. The *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in 1993,[135] states at Part 1 paragraph 5: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." Canada was involved in drafting the Declaration.

How have Canadian courts reconciled apparently conflicting Charter rights in the cases to date? The general principle is stated in *Dagenais v. Canadian Broadcasting Corp*[136] where the Supreme Court of Canada held that the Charter does not create a hierarchy of rights.[137] Further, when the protected rights of two individuals come into conflict, Charter principles "require a balance to be achieved that fully respects the importance of both sets of rights."[138] The fact that the Charter rights and freedoms are not hierarchical and the need to balance competing rights appropriately are significant for this paper.

Dr. Epp Buckingham stated that the courts have not yet established a consistent or adequate framework for resolving competing rights in the area of freedom of religion.[139] There are some cases involving freedom of religion in apparent conflict with another Charter right. In *Ross*, a teacher was ordered removed from his teaching position for discriminatory statements he made while off duty. The New Brunswick Human Rights Commission had conceded that the order infringed Ross' freedom of religion under Charter s. 2(a), but the Canadian Jewish Congress argued that the order did not. The Supreme Court of Canada held that a broad interpretation of the right is preferred, leaving the competing rights to be reconciled under the s. 1 analysis adopted in the *R. v. Oakes* decision. The court noted that this approach is analytically preferable, because it gives the broadest possible scope to judicial review under the Charter and provides a more "comprehensive method of assessing the relevant conflicting values."[140] That being said, the court stated that if the effect on religious belief were tangential or insubstantial, an elaborate consideration of the *Oakes* test would not be necessary.[141] In *Ross* the Supreme Court of Canada determined that the order infringed Ross's freedom of religion (and freedom of expression) and should be examined to see if it could be justified under Charter s. 1. In applying s. 1, the court found that the government had a legitimate objective — a discrimination-free educational environment — and thus its actions were saved by Charter s. 1.

On the other hand, the majority of the Supreme Court of Canada followed a different analytical model in *Trinity Western University v. British Columbia College of Teachers*.[142] In this case, a private religious university (Trinity) offered a degree in education. In the fifth and last year of the program, the degree program was offered under the aegis of Simon Fraser University. Trinity applied to the British Columbia College of Teachers (BCCT) to assume full responsibility for the teacher education program, but BCCT refused, because it was concerned that the Trinity Community Standards embodied discrimination against persons based on sexual orientation. These standards referred to "sexual sins including ...homosexual behaviour." The lower courts found that there was no reasonable foundation for the finding of discrimination. In affirming the lower courts' decision, the majority of the Supreme Court of Canada stated that the heart of the issue was how to reconcile the religious freedoms of individuals wishing to attend Trinity with the equality concerns of students in British Columbia's public school system. The court noted that neither freedom of religion nor the guarantee against discrimination on the basis of sexual orientation is absolute.[143] The Court also said that the Charter must be read as a whole, so one right is not privileged at the expense of another.[144] Thus, freedom of religion co-exists with the right to be free from discrimination based on sexual orientation.[145] The court held that the proper place to draw the line is between belief and conduct and said that "[t]he freedom to hold beliefs is broader than the freedom to act on them."[146] The freedom of religion of the students at Trinity was to be respected absent concrete evidence that training teachers at Trinity fosters discrimination in the public schools.[147] The scope of freedom of religion and equality rights that come into conflict can be circumscribed and reconciled because a teacher in the public system who engages in discriminatory conduct can be subject to disciplinary proceedings before the BCCT. Because it was able to balance the competing rights, the majority did not pursue a Charter s. 1 analysis.

Justice L'Heureux-Dubé, in dissent, clearly preferred the model set out in *Ross*, where conflicting rights are to be addressed in a Charter s. 1 analysis. However, she did not find that the applicant's freedom of religion was infringed in the case.

Dr. Epp Buckingham (2001: 488) suggested that the bifurcation between belief and practice used by the majority in *Trinity* should be used with caution because any limitation on religious practices should be seriously circumscribed. Otherwise the distinction could be used to limit legitimate and "deeply valued religious practices that are at the core of religious identity."

Recently, the Supreme Court of Canada seems to have reconciled the apparent contradiction between the methodologies for resolving conflicts of rights as provided in *Trinity* versus that used in *Ross*. The *Reference re Same-Sex Marriage*[148] included a reference question on the freedom of religion of officials who are asked to perform same-sex marriages contrary to their religious beliefs. The Supreme Court of Canada ruled that Charter s. 2(a) was generally broad enough to protect religious officials, but without a specific set of facts, declined to speculate on all possible situations that might arise. The Court was also asked to opine on whether s. 1 of the proposed marriage legislation would create a collision of rights. This section provides that "1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."[149] The court dealt with what should occur when it appears that two rights might collide. First, the court noted that the first question is whether the rights alleged to conflict can be reconciled, citing *Trinity*. If the rights cannot be reconciled, then a true conflict of rights is made out. In such cases, the court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 (citing *Ross*). The Supreme Court also noted that many, if not all, conflicts between rights would be resolved within the Charter, "by the delineation of rights prescribed by the cases relating to s. 2(a)."[150] Resolution of conflicts of rights generally occurs "within the ambit of the *Charter*, itself by way of internal balancing and delineation."[151]

Dr. Epp Buckingham (2001: 488) felt the approach followed by the majority in *Trinity* (the delineation of rights approach) was preferable, because it allows a more flexible approach to dealing with competing rights than is available in an *Oakes* analysis. Then, if the rights cannot be delineated to resolve the conflict, it should be resolved under a "flexible interpretation of the general limitation clause" (Epp Buckingham 2001: 500-501). This analysis would seem to be supported in the most part by the approach suggested by the Supreme Court of Canada in the *Same-Sex Reference*.

It appears that in the case of a conflict between freedom of religion and gender equality, the current weight of authority in Canada would support a very broad definition of freedom of religion under Charter s. 2(a), with an initial attempt to resolve any conflict between these rights, followed by a consideration of any unresolved competing rights under the Charter s. 1 analysis.

It seems to be highly likely that, in the case of polygamy, a conflict between gender equality and freedom of religion could not be resolved under a Charter s. 2(a) analysis. Because polygamy as a practice is harmful and offends the Charter right to gender equality, anything short of prohibition is untenable. Thus, the court will be required to balance the two competing rights under Charter s. 1.

Horwitz (1996: 56-61) set out his suggested approach to a Charter s. 1 analysis in a freedom of religion case. He argued that the court should approach any conflict between religion and the state from the perspective of the believer. This is because it is not fair to compare a person's belief to the rational, provable interests of the state (Horwitz 1996: 56). Even if the Charter s. 1 analysis is taken from the believer's perspective, Horwitz (1996: 57) admitted that there will be situations in which the state's interest outweighs a person's religious duty. Second, the state should be required to show a compelling interest — an interest in achieving an essential goal, such as one that goes to the heart of democratic values — before it can overcome a conflicting religious claim (Horwitz 1996: 57). This requirement would apply to laws of general application, even if a high administrative burden were imposed on the state. He admits that despite these "stringent protections" there will be justifiable restrictions on religious activity (Horwitz 1996: 57-58). These include harm to non-religious third parties or "grave harm to those who are religious but not perfectly autonomous and thus under the special care of the state" (Horwitz 1996: 58). He cited the example of children requiring blood transfusions to illustrate people who would fit this requirement. Finally, Horwitz (1996: 58) asserted that the state should provide exemptions to laws of general application on the basis of religion.

Professor Etherington (1994: ¶4.2.2.3) noted that there is a sharp division of opinion about how much the law should exempt or accommodate religious marriage practices that violate the Code provisions on bigamy and polygamy. On the one hand, the Law Reform Commission of Canada (LRC) recommended in 1985 that polygamy be removed, yet bigamy retained in the Code.[152] The LRC justified this recommendation, because polygamy was a marginal practice (like adultery) which corresponded to no "meaningful legal or social reality in Canada" (LRC 1985: 23). The LRC (1985: 23) also argued that civil institutions were sufficient to foresee and "control the phenomenon of polygamy." The Commission (1985: 23) also noted that polygamy does not "compete in Canada with the institution of monogamous marriage." On the other hand, Kazi argued that polygamy and bigamy should not be legalized, because this would support patriarchal religious practices "which are denigrating [sic] to the status of women in society, and thus do present a significant harm to participants and to others in society."[153]

The recommendation of the LRC might be tempered by the fact that polygamy is a very real phenomenon in Canada today, 20 years after its 1985 recommendation. Second, the LRC analysis did not address polygamy's personal harm implications, nor its implications for gender equality. Finally, even if a practice is marginal, if Parliament determines that the harm it causes is real, it will legislate against it. Arguably, treason does not often occur in Canada,[154] but we have recognized that it causes harm and should be illegal. Therefore, the argument that we need not legislate against polygamy, because it is merely a marginal practice has logical flaws.

Perhaps a recent decision of the Supreme Court of Utah should be regarded as the best word on the issue of the extent to which a democratic state can take action that may indeed, in its effect, negatively impact the religious belief of a person or group. In its 2004 ruling in *State v. Green*,[155] Utah's Supreme Court unequivocally said:

> Most importantly, Utah's bigamy statute serves the State's interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support…. Moreover, the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging.[156]

The court decided that the interests of women and children in this matter should be paramount, even as it acknowledged the evidentiary difficulty that police and prosecutors face in pursuing criminal charges against practising polygamists who assert as justification freedom of religion. Although of no precedent value for a Canadian court that may have to one day consider criminal charges of polygamy under s. 293 of the Code, the Utah court's decision stands as eloquent testament to the challenge authorities in Utah face in dealing with this perplexing issue. The Utah Supreme Court's words may also be regarded as a reminder to Canadian law enforcement officers, justice officials, judges and lawyers about whose interests are truly at stake here against the backdrop of apparent official acquiescence to the practice of polygamy.

Does Code s. 293 Infringe Charter s. 2(a) and Can It Be Saved by Charter s. 1?

Based on the analysis of Canadian law above, if it can be established that a person practises polygamy for religious reasons,[157] then Code s. 293 might indeed evoke a challenge that it infringes freedom of religion under Charter s. 2(a). However, as noted, there are three possible approaches followed by Canadian courts that may prevent an ultimate finding that the right to freedom of religion has been breached. First, courts will examine whether the infringement of anti-polygamy law on freedom of religion is "tangential or insubstantial." If that is the case, then the legislation will be constitutional. Second, courts may balance and reconcile freedom of religion with the right to gender equality as they pertain to polygamy. If this is possible under a Charter s. 2(a) analysis, the court will find no infringement of freedom of religion. However, as we have concluded above, it is likely that the court will not be willing to find that the infringement is tangential; nor will they be able to reconcile the two rights. This leaves the court with the third stage: determining whether anti-polygamy laws may be saved by a Charter s. 1 analysis. Here the courts will consider whether freedom of religion may be limited by public safety, health, gender equality or other harms-based concerns about the practice of polygamy.

As noted previously, in a Charter s. 1 analysis, the government must establish that the objective underlying the limitation is of sufficient importance to warrant overriding a constitutionally protected right or freedom and that the means chosen to reach this objective are proportionate.[158] In making this analysis, the court must pay close attention to the factual and social context surrounding the enactment of the legislation.[159] These factors assist the court in characterizing the objective of the law that is under scrutiny.

Thus, any Charter s. 1 analysis would involve the balancing of the right to freedom of religion with concerns for gender equality. While there are no precedents that directly discuss how the court would balance freedom of religion and gender equality under Charter s. 1 in the context of anti-polygamy legislation, a number of legal decisions involve the balancing of our right to freedom of expression under Charter s. 2(b) with other rights or societal concerns under Charter s. 1. There are many different situations in which the court has recognized valid limitations on freedom of expression. These include the criminal prohibition against counselling someone to commit suicide; laws regulating materials and behaviour that are viewed as obscene; laws relating to defamation and hate speech and laws regulating advertising aimed at children. The one common feature is the court's reliance on harm as the justification for limiting freedom of expression.

In *R. v. Butler,*[160] for example, the Supreme Court decided that the limitation imposed on freedom of expression by the obscenity provisions in the *Criminal Code* was justified, because it supported an important social objective, namely, the protection of women and children from harm. It determined that the proliferation of sexually degrading and exploitive images harms women and children and that censoring these kinds of images is justified as a protective measure as well as a means of promoting the equality and dignity of all human beings. In *R. v. Keegstra,*[161] the Court found that the *Criminal Code* provision prohibiting hate speech against Jews and other minority groups was a justified limitation on freedom of expression, because it served to promote two important and constitutionally recognized ideals, equality and the establishment of a multicultural society.[162] In *Canadian Newspaper Co.* v. *Canada,*[163] the Court placed a higher value on the privacy rights of complainants in sexual assault cases and the goal of encouraging more victims to come forward and press charges against perpetrators than it did on freedom of the press. In this case, the Court upheld the *Criminal Code* provision which prevents the press from publishing the names of complainants in sexual assault cases.

These cases apply to the present analysis, because like freedom of religion, freedom of expression is given expansive recognition by Canadian courts. The limitations courts are prepared to recognize, such as those related to health, public safety, harm and societal interests, are very similar as well.

There are also legal decisions from British Columbia which discuss the infringement of freedom of religion of protesters who are not allowed within certain "no protest zones" around abortion clinics. The courts in these cases have indicated the freedom of religion was infringed, but that protecting women's equality rights is a valid reason to infringe the right under Charter s. 1.[164]

Since the expressed concern is harm to women and children's equality rights by the practice of polygamy, it would be very difficult to conclude that the courts will disregard this harm in favour of freedom of religion. Although it is quite evident that courts will respect and uphold freedom of religion wherever possible, if it is shown that harm to women and children will be prevented with the enactment of polygamy law, courts will be hard pressed to ignore this evidence. Thus, it is quite reasonable to conclude that Canadian courts when balancing freedom of religion with equality rights when analyzing Code s. 293 would find that the provision survives Charter scrutiny.[165]

CONCLUSION AND LAW REFORM RECOMMENDATION

Polygamy is a complicated issue. Using Bountiful as a running example throughout the paper, we analyzed whether anti-polygamy legislation violates Charter s. 2(a) and cannot be saved by Charter s. 1. This involved looking at several key principles, such as freedom of religion and equality. We noted that while there are no Canadian cases dealing with polygamy and the Charter, courts will find that essential rights and freedoms must give way when their exercise infringes public safety, the personal safety of others or causes other real harms. We have concluded that the practice of polygamy is one of those cases. We have provided a number of reasons why not enforcing anti-polygamy legislation is harmful to women and girl's equality rights. To illustrate this point, we have demonstrated the implications related to the social and legal status of women if the government neither prosecutes nor legalizes polygamy. We conclude that while anti-polygamy law most likely infringes Charter s. 2(a), it would be saved by Charter s. 1, because of the associated harms of non-prosecution to women and girl's equality.

American experience in Arizona and Utah has shown that prosecuting polygamy can have significant implications for all persons involved. However, based on the harms associated with polygamy as it is practised in Bountiful, there do not appear to be any alternatives to prosecution, however difficult it may be. Nevertheless, the repercussions experienced in the United States when authorities prosecuted polygamy on a community scale demonstrate that Canadian authorities may wish to exercise their discretion to deal with the issue on a more individual basis. Also, judges may choose to recognize the sensitive equality issues existing in this very unique community during the sentencing phase.

If necessary, what reform could be made to the wording in Code s. 293 so it would not infringe the Charter s. 2(a)? We have concluded that Code s. 293 would likely be found to infringe Charter s. 2(a) but would be saved by s. 1. We do not find any reforms to the current wording are necessary to address Charter s. 2(a) concerns. It should be noted that this paper does not analyze whether other sections, such as Charter s. 7, would be violated because, for example, the wording is too vague. That issue is beyond the scope of this discussion. We leave that analysis for another day.

APPENDIX A: U.S. JURISPRUDENCE ON RELIGION AND POLYGAMY

Freedom of Religion

Examples of cases following the strict scrutiny test:

Sherbert v. Verner, 374 U.S. 398 (1963): The employer discharged a Seventh-Day Adventist, because she refused to work on Saturdays. She applied for state unemployment benefits, because her conscientious scruples against Saturday work prevented her from obtaining other employment. The United States Supreme Court held that the denial of compensation benefits constituted a burden on the free exercise of religion. Further, although the state argued that there would be fraudulent religious objections to Saturday work, which would dilute the state compensation fund and interfere with employers trying to schedule Saturday work, the Supreme Court held that potential abuse did not justify the abridgment of the woman's freedom of religion. The court noted that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" (p. 406).

People v. Woody, 61 Cal. 2d 716 (1964): Defendants had been convicted under a state statute of illegal possession of peyote, which had been used by Navajo Indians as a sacramental symbol in their religious ceremonies. The court concluded that the statute infringed on the observance of religion. The state asserted that there was a compelling reason for the prohibition of peyote: it had a deleterious effect on the Navajo community, and allowing this exemption would make it difficult to enforce state narcotics law, as people would fraudulently claim religious use of peyote. The court held that the state interests did not outweigh the defendant's interest in religious freedom and ordered that the Navajo community be exempted from the narcotics law.

Wisconsin v. Yoder et al., 406 U.S. 205 (1972): Members of an Amish community were convicted of violating Wisconsin's compulsory school attendance law, by declining to send their children to school after they had graduated from Grade 8. Evidence showed that the Amish truly believed that high school attendance was contrary to the Amish religion and way of life and that they would endanger their salvation and that of their children if they complied with the law. The Amish also provided for informal vocational education after Grade 8. The U.S. Supreme Court held that the Amish had demonstrated the sincerity of their religious beliefs. Further, the State's interest in universal education was not absolute and was subject to the Amish's claim to free exercise of religion. The court held that the Amish had provided sufficient evidence that accommodating their religion by allowing their children to leave school at Grade 8 would not impair the physical or mental health of their children, nor impair their ability to be responsible citizens, nor detract from the welfare of society in any material way.[166]

Examples of cases following the facially neutral test:

Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990): The State of Oregon prohibited all use of peyote, including use by Native Americans. A person who was fired from her job for ingesting peyote was thereby ineligible for unemployment insurance. Justice Scalia noted that this was a case where a generally applicable law that was not aimed at religious practice had a negative impact on religious practice. He went on to state that cases where generally applicable law was found to violate the First Amendment involved a second constitutional protection. The test in *Sherbert* was not applicable to generally applied government regulations. Thus, the law was not unconstitutional. Justice Scalia was soundly criticized for this judgment and the federal congress passed the *Religious Freedom Restoration Act* in 1993, in an attempt to restore *Sherbert* as the applicable test (Sealing 2001).

Church of the Lukumi Babalu Aye v. City of Hialeah 508 U.S. 520 (1993): The Santeria practice of animal sacrifice was at issue. The City adopted three ordinances clearly aimed at prohibiting animal sacrifice, and the Church argued that they violated the Church's rights under the free exercise clause. Justice Kennedy cited *Smith* for the proposition that a law that is neutral and of general application need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice. In this case, the laws were not neutral, because they were aimed at suppressing the central element of Santeria worship. Indeed, the ordinances allowed almost all animal killings except those for religious purposes. Kosher slaughter by Jews was also protected. Thus, the law was neither neutral nor of general application and had to be subjected to "the most rigorous of scrutiny."[167] The government had not demonstrated its interests were compelling and the ordinances were invalidated.

U.S. Cases Dealing with Polygamy

Reynolds v. U.S., 98 U.S. 145 (1878): The Supreme Court of United States upheld a congressional criminal bigamy statute that was challenged under the free exercise clause. In upholding the statute, the Court justified its decision based on "public morality." The Court first held that civilized cultures had frowned upon polygamy and England had consistently treated polygamy as an offence. Further, the practice of polygamy would undermine the "sacred obligation of marriage" as an institution and lead to societies grounded in despotism.[168] To allow a person to practise polygamy would permit people to derogate from the established regulation of marriage and would create an unstable society that valued religion over the "law of the land."[169] The Court continued by comparing consensual polygamy to ritual human sacrifice and Suttee (suicide).[170] This decision has been criticized for being the result of prejudice against Mormons at that time in United States history (Vazquez 2001-2002).

Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S., 136 U.S. 1 (1890): The Congress passed the *Morrill Act* of 1862, which made polygamy a criminal offence and revoked the Mormon Church's organizational charter and confiscated all of the Church's real estate holdings in excess of $50,000. In a proviso, the congressional majority noted that the sole purpose of this provision was to end the Church's practice of polygamy. In 1887, the government passed the *Edmunds-Tucker Act*, which called for all real properties of the Church held in violation of the *Morrill Act* to be confiscated and sold to pay for public schooling. The statute also barred the church from using trust accounts to protect its property. The majority opinion affirmed the previous findings on polygamy, holding that it was not a religious practice, but rather "being against the enlightened sentiment of mankind." [171]

Cleveland v. U.S., 329 U.S. 14 (1946), reh'g denied, 329 U.S. 830, reh'g denied 329 U.S. 831 (1946): The Supreme Court reviewed the convictions of six men for transporting their plural wives across state lines. The *Mann Act*[172] criminalized the use of interstate commerce for the transport of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." The Court concluded that the defendants' conduct fell within "immoral purpose." Justice Douglas described polygamy as "in a measure, a return to barbarism."[173] The establishment and maintenance of a polygamous household is "a notorious example of promiscuity."[174]

Potter v. Murray City, 585 F. Supp. 1126 (D. Utah 1984), aff'd, 760 F.2d 1065 (10th Cir. 1985): An FLDS police officer was fired, because his employer became aware of his polygamous lifestyle. Potter filed suit, seeking reinstatement and back pay. Both courts sided with the city, holding that the requirement of monogamy met the compelling state interest test, declaring it to be "inextricably woven into the fabric of our society" and the "bedrock upon which our culture is built."[175]

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ENDNOTES

[1] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982 c. 11.

[2] R.S.C. 1985, c. C-46

[3] Smyth (1992): "Charges will not be laid against a religious splinter group that practices polygamy because the relevant section of the Criminal Code is unconstitutional, the B.C. Attorney General's Ministry said Thursday."

[4] A sealing is a covenant between a man and a woman, outside of a traditional, civil marriage, to be faithful to each other for eternity beyond physical death.

[5] R.S., c. C-34, s. 257.

[6] See, for example, *R. v. Haugen*, [1923] 2 W.W.R. 709 (Sask. C.A.); *R. v. Moore*, [2001] O.J. No. 4513 (Prov. Ct.) (QL); *R. v. Moustafa*, [1991] O.J. No. 835 (Prov. Ct.) (QL).

[7] *R. v. Tolhurst and Wright*, [1937] O.R. 570 (Ont. C.A.).

[8] *State v. Green*, 518 Utah Adv. Rep. 30 (Utah Sup. Ct. 2005).

[9] *State v. Green*, 507 Utah Adv. Rep. 45 (Utah Sup. Ct. 2004).

[10] *Yew v. British Columbia (Attorney General)*, [1924] 1 D.L.R. 1166 (B.C.C.A.).

[11] *Yuen Tse v. Minister of Employment and Immigration*, [1983] 2 F.C. 308 (C.A.).

[12] *Re Hassan & Hassan* (1976), 12 O.R. (2d) (Prov. Ct.).

[13] *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1640 (T.D.).

[14] *Immigration and Refugee Protection Regulations* SOR/2002-2270, s. 117(9)(c).

[15] *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5.

[16] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at ¶57-8. See also: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (QL) and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[17] *Convention on the Rights of the Child*, GA res. 44/25, annex, 44 UN GAOR Supp (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force September 2, 1990.

[18] *Convention on the Elimination of All Forms of Discrimination against Women*, March 1980, C.T.S. 1982/31; 19 I.L.M. 33.

[19] There were some exceptions, however. For example, even if it occurred in private, there were criminal sanctions for gay sex. Also, the activities of people of lower incomes were often scrutinized more than those of the upper class and the autonomy of poorer persons was not respected to the extent accorded to the upper class.

[20] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143.

[21] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497.

[22] *Law*, supra note 21 at 524.

[23] *Law*, supra note 21 at 525.

[24] *R v. Red Hot Video* Ltd. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.), leave to appeal to S.C.C. refused (1985), 46 C.R. (3d) xxv.

[25] Some examples are the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention on Economic, Social and Cultural Rights* and the *International Convention on Civil and Political Rights.*

[26] *Convention on the Elimination of All Forms of Discrimination against Women,* G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

[27] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 240.

[28] *Law*, supra note 21 at 548.

[29] *Law*, supra note 21 at 530.

[30] According to Statistics Canada, in 2004, of just under 32 million Canadians, of which about 24 million are over age 19, approximately 15.5 million are married, separated or living common law. See Statistics Canada (nd).

[31] For a contemporary analysis of the ongoing harms of Canadian family law on First Nations women, see Monture-Angus (1999: 76-97).

[32] *Edwards v. Canada (Attorney General),* [1930] A.C. 124 (J.C.P.C.).

[33] *M. v. H.*, [1999] 2 S.C.R. 3 at 57.

[34] *R. v. Butler*, [1992] 1 S.C.R. 452 at 498.

[35] Ibid. at 504.

[36] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571.

[37] Ibid. at ¶173 and ¶215.

[38] Ibid. at ¶129.

[39] Ibid. at ¶114.

[40] The Supreme Court of Canada upheld the constitutionality of the defence provided under this section in *Canadian Foundation for Children Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

[41] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

[42] Ibid. at ¶44.

[43] *Malmo-Levine*, supra note 36 at ¶140.

[44] Similar concerns have been expressed regarding the equality implications of the Ontario government's recent debate about whether it will permit civil disputes, such as divorce to be mediated under Sharia, or Islamic law. See for example, Christopher (2004).

[45] See for example, *R. v. Lavallee*, [1990] 1 S.C.R. 852.

[46] Vazquez (2001-2002: 248). See also Bozzuti (2004).

[47] This paper does not examine the positive or negative social implications of polygamous relationships from other cultures, but instead focusses on the Canadian experience of polygamy in open polygamous communities, such as Bountiful.

[48] For instance, see *Estate Administration Act*, R.S.B.C. 1996, c. 122.

[49] *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698.

[50] (1866) L.R. 1 P&D 130 at 133. Followed in *Lim v. Lim*, [1948] 1 W.W.R. 298 (B.C.S.C.).

[51] These unions have only been recognized for the limited purposes of finalizing a legal dispute, such as the rights when a man has two widows in a will's dispute. For instance, *Yew*, supra note 10.

[52] See for instance, *Ali*, supra note 13.

[53] *A.A. v. B.B.*, [2003] O.J. No. 1215 (S.C.) (QL).

[54] See, for example *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 (QL).

[55] *Adult Interdependent Relationships Act* S.A. 2002, c. A-4.5.

[56] Ibid. at s.10(c).

[57] Ibid. at s.(2)(c).

[58] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) s. 8(1).

[59] Ibid. s. 8(2).

[60] Ibid. s. 11(1)(c).

[61] An additional problem arises with respect to when the limitation period would start to run: presumably upon the date of legal marriage to the second wife.

[62] See AIRA, supra 55; *Divorce Act*, supra 58; and *Matrimonial Property Act*, R.S.A. 2000, c.M-8.

[63] Children can make a claim for support or maintenance under any number of statutes. See for instance, *Parentage and Maintenance Act*, R.S.A. 2000, c. P-1.

[64] See, for example, *Hofer v. Hofer*, [1970] S.C.R. 958 and *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165.

[65] *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383.

[66] *Lakeside*, supra note 64 at 179-82.

[67] For instance see, *Family Relations Act* (R.S.B.C. 1996), c. 128; *Child Support Guidelines* Regulation B.C. Reg. 61/98.

[68] BC (1993: 10). See also *Re L.A.M.*, [1978] A.J. No. 531 (Prov. Ct.), where the court held that children of a polygamous family were neglected and subjected to an unhealthy environment. They were committed to child welfare custody.

[69] AIRA, supra note 55 at subs. 1(2).

[70] See for example *Income and Employment Supports Act*, S.A. 2003, c. I-0.5; *Income Supports, Health and Training Benefits Regulation Alta*. Reg. 60/2004, s. 1.

[71] *Employment and Assistance Act*, R.S.B.C 2002, c. 40; *Employment and Assistance Regulation* B.C. Reg. 263/2002.

[72] See for instance, *Falkiner v. Ontario (Ministry of Community and Social Services*, (2002), 59 O.R. (3d) 481 (C.A.).

[73] BC (1993: 28) reported that women are mostly given tasks around the house while men are supposed to be the primary providers. However, some women do work in community schools.

[74] *Income Tax Act*, R.S.C. 1952, c. 148.

[75] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 261-2.

[76] Orwell (1946). The actual quotation from this allegory of an animal revolution gone wrong is: "All animals are equal but some animals are more equal than others." (p. 118).

[77] [1998] 1 S.C.R. 493.

[78] [1997] 3 S.C.R. 624.

[79] [2001] 3 S.C.R. 1016.

[80] Ibid. at ¶19.

[81] Ibid. at ¶28.

[82] Ibid. at ¶20.

[83] Ibid. at ¶24.

[84] Ibid. at ¶¶28-29.

[85] *Vriend*, supra note 77 at ¶60.

[86] *R. v. Morgentaler* (1988), 44 D.L.R. 4th 385 (S.C.C.).

[87] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657.

[88] See for example, Rachin (1997).

[89] [1986] 1 S.C.R. 103.

[90] *Dunmore*, supra note 79 at ¶49.

[91] Ibid.

[92] *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. III. No. 5.

[93] Brown (2000: ¶18). See also Doyle (1984); *Samur v. City of Quebec*, [1953] 2 S.C.R. 299; *Boucher v. The Queen*, [1951] S.C.R. 265; *Chaput v. Romain* (1955), 1 D.L.R. (2d) 241 (S.C.C.) and *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

[94] Two leading cases dealing with education and religion, will not be discussed further: *Zylberg v. Sudbury Board of Education (Director)* (1988), 52 D.L.R. (4th) 577 (Ont. C.A.); *Adler v. Ontario*, [1996] 3 S.C.R. 609.

[95] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at ¶¶94 and 95.

[96] See: *Ross v. New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1 (S.C.C.); and *Jones v. The Queen*, [1986] 2 S.C.R. 284.

[97] Beaudoin and Ratushny (1989). See also *Jones*, supra note 96 wherein the Supreme Court of Canada (per LaForest J.) said that the rights guaranteed under the Charter are not absolute and that their protections are subject to “the limits of reason” (at 300 (cited to S.C.R.)).

[98] *R. v. Edwards Books and Arts Ltd.*, [1986] 2 S.C.R. 713.

[99] Ibid. at ¶97.

[100] Ibid.

[101] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.

[102] R.S.Q., c. C-12.

[103] *Amselem*, supra note 101 at ¶39.

[104] Ibid. at ¶40.

[105] Ibid. at ¶51.

[106] *Ross*, supra note 96 at ¶71. See also *Jones*, supra note 96.

[107] *Ross*, supra note 96 at ¶56. This may be contrasted with the development of freedom of religion in the United States. See below.

[108] *R. v. W.H. Smith Ltd. et al* (1983), 26 Alta. L.R. (2d) 238 (Prov. Ct.).

[109] Ibid. at 258.

[110] *Edwards Books*, supra note 98 at 759.

[111] Ibid. at 761.

[112] Adopted December 16, 1966, entered into force March 23, 1976, GA Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc.A/6316 (1966) [ICCPR].

[113] *Big M Drug Mart*, supra note 95 at 337.

[114] *R. v. Videoflicks* (1984), 48 O.R. (2d) 395 (C.A.), rev'd in part (*sub nom. Edwards Books & Art Ltd. v. R.*) supra note 98.

[115] Ibid.

[116] U.S. Const. Amend. I.

[117] *United States v. Ballard*, 322 U.S. 78 (1944). Indeed the court focusses on the sincerity of the belief and not its merits. See: *Fowler v. Rhode Island*, 345 U.S. 67 (1953) and *United States v. Seeger*, 380 U.S. 163 (1965).

[118] A more limited approach to "religion" was taken in *Borchert v. City of Ranger Texas*, 42 F. Supp. 577 (1941) and *Minersville School Dist. v. Gobitis*, 108 F. 2d 683 (1939), both of which seem to require a belief in a Creator or God.

[119] 58 Cal. 457 at 512 (1881).

[120] Sealing (2001). It should be noted that Sealing does not discuss the criminal law interests of the state; he focusses on the civil law complications of allowing polygamy. See also Gillett (1999-2000).

[121] It should be noted that this material was written before the facially neutral test was developed.

[122] *Big M Drug Mart*, supra note 95 at 346.

[123] *Amselem*, supra note 101 at ¶62.

[124] Ibid. at ¶62.

[125] Ibid. at ¶82.

[126] [2004] 2 S.C.R. 650.

[127] Ibid. at ¶67.

[128] Ibid. at ¶69.

[129] [1995] 1 S.C.R. 315.

[130] Ibid. at ¶¶108-109.

[131] Ibid. at ¶226.

[132] Ibid. See also: *P. (D.) v. S. (C.),* [1993] 4 S.C.R. 141; *Young v. Young*, [1993] 4 S.C.R. 3.

[133] Horwitz (1996). See discussion of United States jurisprudence in Appendix A.

[134] Peter and Hutchinson (1988-89: 542). An example of a case involving this conflict (equality vs. liberty) is *R. v. Red Hot Video Ltd.*, supra note 24, where the British Columbia Court of Appeal held that the obscenity provision of the *Criminal Code* was justified and did not contravene the right to freedom of expression because the form of expression it prohibited was demeaning to women and therefore undermined gender equality rights.

[135] June 25, 1993, A/CON.157/23.

[136] [1994] 3 S.C.R. 835.

[137] Ibid. at 877.

[138] Ibid.

[139] Epp Buckingham (2001: 477). See also Von Heyking (2000: ¶51) where he says that it is unclear how the Supreme Court of Canada will resolve conflicts between equality rights and freedom of religion.

[140] *Ross*, supra note 96 at ¶74.

[141] Ibid. at ¶75.

[142] [2001] 1 S.C.R. 772.

[143] Ibid. at ¶29.

[144] Ibid. at ¶31.

[145] Ibid. at ¶34.

[146] Ibid. at ¶36.

[147] Ibid.

[148] *Same-Sex Reference; Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.).

[149] Ibid. at ¶15.

[150] Ibid. at 720.

[151] Ibid. at 720-1.

[152] LRC (1985: 22-23). See also Gold and Young (1994).

[153] Kazi Hamid, *Criminal Law Issues Involving Religion and Conscience* as cited in Etherington (1994: ¶4.2.2.3).

[154] Code, supra note 2 ss. 46 to 48.

[155] *State v. Green*, supra notes 8 and 9.

[156] Ibid. at ¶40 (2004).

[157] Presumably in polygamous relationships not involving religion, the potential Charter challenges might involve Charter s. 7; however, this is not the subject of this paper.

[158] *Dunmore*, supra note 79 at ¶49.

[159] Ibid.

[160] [1992] 1 S.C.R. 452.

[161] *R. v. Keegstra,* [1990] 3 S.C.R. 697.

[162] Section 27 of the Charter states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

[163] [1988] 1 S.C.R. 122.

[164] See for example, *R. v. Lewis*, [1996] B.C.J. No 3001 (S.C.) (QL).

[165] This analysis does not address whether s. 293 might offend other sections of the Charter, such as Charter s.7, for example, because it is too vague.

[166] For a criticism of the holding in the case, see Arneson and Shapiro (1996).

[167] Church of the *Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993) at 546.

[168] *Reynolds v. United States*, 98 U.S. 145 (1978) at 164-66. On the other hand, Donovan (2002: 578) argued that it is despotic rulers who use their power to accumulate women (polygyny) and perhaps wives (polygamy).

[169] *Reynolds* ibid. at 165.

[170] Ibid. at 166.

[171] *Late Corporation of the Church of Jesus Christ of Later-Day Saints v. United States*, 136 U.S. 1 (1890) at 50.

[172] *White-Slave Traffic (Mann) Act*, ch. 395, 36 Stat. 825 (1810).

[173] *Cleveland v. United States,* 329 U.S. 14 (1946) at 19.

[174] Ibid.

[175] *Potter v. Murray City*, 760 F.2d 1065 at 1070 (D. Utah 1984).